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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 369.

AMERICAN COLUMN & LUMBER CO. ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF THE CASE.

INTRODUCTORY STATEMENT.

This is a direct appeal to this court by the defendants in an equity suit brought by the United States under the Sherman Antitrust Act (July 2, 1890, 26 Stat., ch. 647, p. 209; Comp. Stat., 1916, sec. 8820) against 329 corporations, firms, and individuals engaged in manufacturing hardwood lumber and selling it in interstate commerce and 274 individuals representing them, from the final decree of the District Court of Western Tennessee enjoining

the defendants from further carrying out a conspiracy in restraint of interstate trade and commerce in hardwood lumber.

THE BILL OF COMPLAINT.

The object of the conspiracy was alleged in the bill of complaint as being to maintain the prices demanded by the defendants for hardwood lumber in January, 1919, and to enormously enhance such prices within a year thereafter, *by suppressing competition in prices among the defendants, and substituting in its place cooperation and agreements having the purpose and effect of maintaining and increasing prices.* (R. 21.)

The alleged means of accomplishing that object may be thus briefly stated:

Joining together in January, 1919, as members of the so-called "Open Competition Plan," with the published slogan—

"COOPERATION, NOT COMPETITION, IS THE LIFE OF TRADE";

Maintaining offices, clerical forces, and a so-called "manager of statistics" for the operation of that plan;

Compiling and distributing monthly "*Stock reports*" and "*Production reports*" containing full information concerning amounts of stock on hand, sold and unsold, and rates of production, present and future, of each and every defendant company;

Printing and distributing *monthly bulletins* which called attention to a shortage of hardwood lumber disclosed by such reports, explained that such dis-

closure of shortage enabled the defendants to cooperate in exacting higher prices, urged against meeting the shortage by increasing production and urged against sales at existing prices and in favor of higher prices because of the shortage;

Compiling and distributing among the defendants weekly "*Sales reports*" showing full details of each and every actual sale of hardwood lumber by each defendant company, including selling prices received;

Printing and distributing a bulletin reproducing and commending explanations by individual defendants of the manner in which the reports of prices received were used in enhancing future prices;

Discussing prices at monthly group meetings of the defendants so as to produce mutual approval for high prices received, and mutual oral predictions that high prices would continue;

Compiling and distributing monthly *answers to questionnaires* constituting an exchange of written predictions by the defendants that prices would continue high.

THE EXHIBITS TO THE BILL OF COMPLAINT.

The weekly information furnished to one another concerning the *selling prices* of each company is shown by copies of the "Sales reports" for the weeks ending January 25, 1919, and January 31, 1920, attached to the bill of complaint as Exhibits A and B. (R. 33, Ex. A, 1–34; R.

35, Ex. B, 1–71.)[1] Each individual sale is there separately reported and listed, showing the name of the selling company, the date of sale, the number of feet involved, the kind and variety of lumber, the thickness, the destination, and the *delivered price* to the consumer. (R. 35, Ex. B, 1–71.)

The monthly information furnished to one another concerning the *aggregate stocks* of all the companies is shown by an example of the "Stock reports" annexed to the bill of complaint as Exhibit C. (R. 37, Ex. C, 1–64.) This shows the aggregate stocks on hand of each kind, variety, and thickness, both sold and unsold, as of the date of the report; also comparisons with the last previous report, showing increases or decreases during the intervening month.

The monthly information furnished to one another concerning the *individual stocks* of each company is shown by a *supplementary* "Stock report" of six mimeographed pages immediately following the above-mentioned "Stock report" in the record. The supplementary report lists the companies by name and shows for each one of them the normal stock, the present stock, and the percentage of present stock to normal.

---

[1] Each exhibit in the printed transcript of record contains numerous pages consecutively numbered as pages of the exhibit, but not as pages of the printed transcript. Thus, for instance, a reference to the tenth page of Exhibit A, which begins at page 33 of the printed transcript, would be as follows: R. 33, Ex. A, 10. The paging of the *original* transcript, reproduced in the printed transcript, will be disregarded, except where otherwise indicated.

The monthly information furnished to one another concerning the *rate of production* of each company is shown by a "Production report" annexed to the bill as Exhibit D. (R. 39, Ex. D, 1–9.) Opposite the name of each company is its normal monthly production, present monthly production, percentage of present production to normal, estimated production for the next 60 days, and percentage of the estimated production to normal.

EXCERPTS FROM PLAINTIFF'S EVIDENCE.

It was admitted in the answer that the defendants were parties to the so-called "Open Competition Plan." (R. 42.)

The slogan of the "plan" to replace competition by cooperation is shown by the bulletin on the first page of Volume I, No. 1, of the sales report for January 25, 1919, which is in part as follows:

> AMERICAN HARDWOOD MANUFACTURERS' ASSOCIATION OPEN COMPETITION PLAN—SALES REPORT.
>
> Vol. I, No. 1, executive office, Bank of Commerce and Trust Company Building, Memphis, Tenn., week ending Jan. 25, 1919.
>
> OPEN COMPETITION PLAN.
>
> INTRODUCTION.
>
> COOPERATION, NOT COMPETITION, IS THE LIFE OF TRADE. That is a modern business slogan with the twentieth century ring to it, and it explains why one of the most significant and widespread movements among the business men of

> America during the past ten years has been that toward organization. (R. 33.) [Capitals ours.]

1. COOPERATIVE ENHANCEMENT OF PRICES THROUGH THE SHORTAGE OF PRODUCTION.

A complete series of the monthly "Stock reports" and monthly "Production reports" is in evidence in the custody of the clerk of the court. Examples of each are printed in the record as Exhibits C and D, respectively, attached to the bill of complaint, as noted above. (R. 37, 39.)

There was a shortage of hardwood lumber throughout the year 1919. For the first part of that year there is evidence of efforts in the "plan" to prevent the defendants from meeting the shortage by increasing their production. This evidence is found in the minutes of the meetings, and in the monthly bulletins published on the front pages of the "Sales reports." For instance:

At the meeting of January 21, 1919, the minutes show that the chairman declared: "If there is no increase in production, particularly in oak, there is going to be good business" and "no man is safe in increasing his production." There followed a general discussion of market conditions, participated in by all present. (R. 93, 94.)

At the meeting of March 11 the minutes show that low stocks were commented on. (R. 105.) "Production reports" showing 43 per cent, 73 per cent, and 45 per cent of normal production in the different territories were examined. A discussion ensued to

the effect "that the outlook was very encouraging." (R. 108.)

At the meeting of April 11 the minutes show that there was a discussion of "market conditions," participated in by all present, in which "a number of members reported that they were running from 50 to 75 per cent of normal production," and the opinion was expressed "that the 54 per cent production during the next 60 days would have its effect." (R. 114, 115.)

At the meeting of May 9 the minutes show that copies of the monthly "Market condition report" were distributed and a discussion followed in which "reference was made to members who contemplated running day and night," and it was stated that "we ought to be very sure that the market is capable of taking care of night and day lumber." (R. 122.)

The bulletin for the week ending May 17 stated that stocks were below normal—

> The tendency in the quotations is upward with the demand on the increase and the *stocks at producing points below normal*—

and thereupon reprinted as being "*very timely*" the following article urging lumber manufacturers *not to increase production:*

> Lumber manufacturers should not overlook the fact that they are about to be confronted with a magnificent opportunity to *kill a goose which is just now industriously engaged in producing golden eggs.* * * * When the demand for lumber is keen and the prices are good it is necessarily a strong temptation

> to the sawmill men to put on a night shift at the mill and an extra logging crew in the woods and keep turning out lumber 24 hours out of the day. * * * It would be *criminal folly*, therefore, for the lumber manufacturers to indulge themselves in any such form of commercial suicide—

and appended the following comment:

> Are we guilty? If so, the warning is timely. (R. 1077, 1078. [Italics ours.]

At the meeting of May 21 the minutes show that a member stated—

> That in his opinion it was suicidal to run mills night and day. That the pine mills had done it, but that he hoped they would profit by their past experience and not do it this year—

whereupon there followed a discussion of the "Market condition report." (R. 129.)

Minutes of subsequent meetings show that the existing shortage was found satisfactory and discussions terminated in the conclusion that there was no likelihood of production sufficient to equal the demand. For instance, the following excerpts:

> It is the prevailing opinion that the market will remain good for the next few months. The demand is still in excess of the supply, and there is no probability of an immediate production great enough to catch up. (Minutes of meeting of Aug. 8, 1919; R. 159.)
>
> The outlook for the next few months brought forth an interesting discussion. It was the consensus of opinion that the market

will continue to be good for the next few months. The demand is still in excess of the supply, and there is no probability of an immediate production great enough to catch up. (Minutes of meeting of Aug. 20, 1919; R. 166.)

The replies to question No. 8 indicated that the market will continue good for the next few months. The demand is in excess of the supply, and there is no probability of an immediate production great enough to catch up. (Minutes of meeting of Aug. 27, 1919; R. 168.)

The abnormal demand for hardwood lumber remained as strong as ever, and with the continually diminishing stock available, there was every reason to expect a continuance of the present satisfactory conditions for some months to come. (Minutes of meeting of Jan. 13, 1920; R. 205.)

There was no indication that members expect anything but a continued good business for some months to come. The demand continues strong for hardwoods and there is no probability of a production to balance the insistent demand. (Minutes of meeting of Jan. 15, 1920; R. 208.)

Beginning in March the monthly bulletins, letters written by the defendants, and the minutes of the meetings show insistent cooperative efforts for higher prices on the basis of the shortage disclosed in the "Production reports" and "Stock reports." For instance:

The importance of the monthly "Stock reports" was thus emphasized by the "manager of statistics" in the bulletin for March 8, 1919:

> The "Stock reports" of the association have become one of the most detailed and complete statistical publications issued by any association in the world. Members who are not cooperating in this feature of association activity owe an obligation to their fellow members to give the fullest information relative to the condition of stocks on hand sold and unsold. (R. 1064.)

At the meeting of August 12, 1919, as shown by the minutes, there was a discussion in which a member recommended the use of the "Stock reports," thus:

> I consider the "Stock reports" one of the most valuable reports published by our association * * *. We find that stocks on hand in oak have decreased 80,000,000 since January 1, and that all hardwoods have decreased 213,000,000 feet. The decrease would have been more had the same membership reported on January 1 as on July 1. Every member ought to take this report and study it. (R. 162.)

At the meeting of September 7, 1919, as shown by the minutes, a member stated in the course of discussion that the "Stock reports" explained the advance in prices which had taken place. He—

> called attention to the fact that the "Stock report" was the most valuable report published by the association. This report con-

> tains information that is invaluable to all members, information that could not be purchased at any price except through the association, and information that explains why the price of lumber has advanced. (R. 169.)

Thereupon, it was voted to publish the "Stock reports" earlier in the month. In that connection it was emphasized that the information was to be used in procuring higher prices—

> that it would have very much to do *with getting better prices* if members could know actual stocks on hand as quickly as possible. (R. 169, 170.) [Italics ours.]

Another member declared on August 1, 1919 in response to the question "What is your view of market conditions for the next few months?"—

> We can see no reason for a decline, and *a perusal of last month's stock list* is very convincing proof of a *further advance*. (R. 639.) [Italics ours.]

A letter dated May 28, 1919, from a member to the "manager of statistics" declares that a discussion of the shortage of red gum at a monthly meeting of the defendants resulted in an increase of prices, thus:

> It is difficult to estimate just what this information meant to us, but at any rate it would not be much out of the way to say that this information enabled us to obtain business for these items that brought us *returns over and above our anticipations*, probably five to ten times more than our annual dues. (R. 1055, Ex. 1, 12.) [Italics ours.]

The bulletin of March 8 reprinted *with approval* an article congratulating the defendants on having successfully resisted efforts to lower the prices of hardwood lumber. The article also explained how the discussions of shortage at the monthly meetings affected selling prices, thus:

> For instance, at the recent meeting of the open competition plan of the American Hardwood Manufacturers' Association in Memphis the fact was developed that the production of mills embraced in that group of manufacturers is at the present time only 56 per cent of normal; and that practically the same situation exists throughout the hardwood producing territory. It was also shown that stocks at mills are only about three-quarters normal, the number of mills having any oversupply at all being practically negligible.
>
> With this information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to the proper course for him to pursue in selling his lumber. (R. 1064.)

The bulletin ended with the following statement:

> With cooperation of this kind, we will very soon have enlisted in our efforts practically every producing interest, and *you know what that means.* (R. 1065.) [Italics ours.]

Again, the bulletin of March 29 encouraged the procuring of higher prices on the basis of shortage disclosed in the "Stock reports," as follows:

> Reliable statistics gathered by this association indicate that stocks on hand at present

> are only about 60 per cent of normal. * * * Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman if the facts were better understood; offers of business now at shaded prices would get scant consideration. * * * Manufacturers naturally are not going to sell very far ahead at the present level of prices * * * . (R. 1068).

Again, the bulletin of April 26 exulted in the shortage disclosed by the "Stock reports," and encouraged the procuring of higher prices through the shortage and through the restriction of competition among the defendants, thus:

> If ever there was a time when *rich rewards* awaited the producer of hardwood lumber—now is that time. *There are glorious opportunities ahead.* * * * Production during the month of April was a little less than 60 per cent of normal, and the estimated production for the next 60 days is 70 per cent of normal, weather conditions having improved during the past month. Stocks are now less than 75 per cent of normal, badly broken, and some items practically exhausted. * * * The demand is with us, the supply inadequate, therefore *values must increase, as our competition in hardwoods is only among ourselves.* (R. 1073.) [Italics ours.]

Again, the bulletin of May 24 emphasized that stocks were small and encouraged the defendants to exact higher prices, thus:

> The tendency of the market is upward and will undoubtedly continue to advance so long

> as sales and production bear their present relation to each other. (R. 1080.)

Again, the bulletin of September 20 dwelt on the shortage and encouraged the defendants to maintain high prices, thus:

> Those who have been looking for lower prices overlook the very important factors: That production continues below normal at a time of the year when mills should be piling up lumber if they are ever going to be able to do it; that unsold stocks at mills are 70 per cent below normal [followed by reference to car shortage and possible labor troubles]. With these conditions prevailing, there is nothing in the situation that should encourage anyone to hope for a drop in quotations. (R. 1091.)

Further similar arguments for higher prices on the basis of the shortage disclosed in the reports will be found in the bulletins at R. 1082, 1084, 1087, 1090.

At each meeting throughout the year (some of which have already been referred to), there was a discussion of the current "Stock reports" and "Production reports" in which the shortage of production and stocks was emphasized. (R. 108, 117, 127, 129, 132, 140, 142, 145, 147, 149, 152, 153, 155, 156, 158, 160, 164, 165, 166, 167, 169, 175, 177, 179, 182, 184, 189, 190, 192, 195, 197, 200, 205, 207, 210, 214, 219, 221.)

2. COOPERATIVE ENHANCEMENT OF PRICES THROUGH REPORTS AND DISCUSSIONS OF PRICES RECEIVED.

a. THE PRINTED WEEKLY REPORTS OF PRICES RECEIVED.

As previously noted, the first and last of the "Sales reports," for January 25, 1919, and January 31, 1920,

respectively, showing prices actually received by the defendants, are attached to the bill of complaint as Exhibits A and B. (R. 33, Ex. A, 1–34; R. 35, Ex. B, 1–71.) The complete intervening series of "Sales reports" is in evidence in the custody of the clerk, but has not been reprinted in the record.

Inspection of one of these "Sales reports" will show that each individual sale for the week covered by the report is separately recorded, showing the name of the selling company, the date of sale, the number of feet involved, the kind and variety of lumber, the thickness, the destination, and the delivered *price* (including freight) to the customer. These reports reached the members about a week after the sales were made. (R. 1241.)

The use of the "Sales reports" may be understood by selecting any particular item of hardwood lumber in the first report of the series, noting the prices at which it was then sold at any given destination, following the prices reported for the same item at the same destination throughout the successive subsequent reports, and observing how ever-increasing prices were thus constantly reported, so that they could be used as guides and examples for all the defendants in further enhancing their prices.

The total increases of prices brought about during the year when such reports were compiled and distributed are shown by a comparison of prices reported in Exhibits A and B, the first and last reports of the series. The following table selects from the two exhibits, and compares, those prices which are

strictly comparable as involving the same kind, variety, and thickness of lumber, and the same destination—showing doubling and trebling of such prices during the year—or *an average increase of 147 per cent:*

TABLE ILLUSTRATING RISE IN DEFENDANTS' PRICES BETWEEN JAN. 25, 1919, AND JAN. 31, 1920.

Kind of lumber.	Thickness.	Destination.	Page, Ex. A.	Price per M.	Page, Ex. B.	Price per M.	Percentage of increase.
Firsts and seconds sap gum...	4/4	Grand Rapids.	11	$37.50	7	$101.75	170
No. 2 common sap gum.....	4/4	Cairo.....	12	27.25	11	47.25	70
Firsts and seconds quartered white oak.	5/4	Kansas City...	13	123.00	17	310.00	150
Firsts and seconds plain white oak.	12/4	.....do.....	13	87.00	20	214.00	140
Do.....	16/4	.....do.....	13	87.00	20	214.00	140
Do.....	16/4	.....do.....	13	110.00	20	214.00	94
No. 1 common and selects plain white oak.	4/4	Memphis.....	13	37.00	20	132.75	270
Do.....	4/4	Chicago.....	13	47.00	20	155.00	220
No. 2 common plain white oak	4/4	Pine Bluff....	14	28.75	21	94.00	230
Do.....	4/4	Memphis.....	14	27.00	21	79.50	190
No. 1 common and selects plain red oak.	4/4	.....do.....	15	37.00	25	137.75	270
Do.....	4/4	Chicago.....	15	45.00	25	135.00	200
No. 2 common plain red oak..	4/4	Pine Bluff....	15	28.75	25	81.50	190
Do.....	4/4	Memphis.....	15	27.00	25	78.75	190
Firsts and seconds plain white oak.	4/4	Boston.....	19	87.00	47	191.00	120
No. 1 common and selects plain white oak.	4/4	.....do.....	20	61.00	48	137.00	120
Do.....	8/4	.....do.....	20	87.00	48	147.00	70
Firsts and seconds plain red oak.	4/4	New York City	21	85.00	50	177.00	100
Firsts and seconds plain poplar	4/4	.....do.....	25	100.00	53	147.50	47
No. 1 common poplar.....	4/4	Brooklyn.....	26	61.50	55	100.00	60
Do.....	4/4	New York City	26	61.50	55	101.00	60
Average increase.....							147

Numerous defendants wrote letters showing how the "Sales reports" were of great assistance in accomplishing the enhancement of their prices, in

response to a circular letter from the "manager of statistics" dated April 23, 1919, requesting them to state their experiences with the plan as follows:

> Every time we hold one of our monthly meetings some member gets up and relates his experience with the open competition plan. This is always very interesting, but it is only heard by those present and is soon forgotten.
>
> Every member of the plan has no doubt received some benefits therefrom, and we believe it would be wise for the members to reduce to writing their experience with the plan, in order that a record may be preserved. (R. 1055, Ex. 1, 1118.)

Fifty-four answers to that letter were received from various defendants, from which the following are a few excerpts:

> Your reports of actual sales enables the manufacturer to see what his neighbors are getting for their lumber and through this course of education, I might say, all those who have access to your reports bring their prices to the top. (R. 1055, Ex. 1, 1120.)
>
> Under the old plan of every one for himself prices were not so stable and it took them longer to go up and they came down more quickly. * * * There seems to be a friendly rivalry between members to see who can get the best prices whereas under the old plan it was cut-throat competition. (R. 1055, Ex. 1, 1124.)
>
> We refer to these sales reports continuously, and find them of inestimable value. (R. 1055, Ex. 1, 1121.)

Our experience has been that the open competition plan has been absolutely accurate but instead of apparently stabilizing the market, it has caused a runaway market. (R. 1055, Ex. 1, 1122.)

In many instances [it] has made us one or more dollars per thousand feet on lumber that we have sold and we believe that the plan is going to be very successful in carrying out the purposes for which it is intended. (R. 1055, Ex. 1, 1139.)

The plan in numerous instances has enabled us to secure more money for our product than we otherwise would have secured without this plan in operation, and we consider this feature probably the most important of the association work. (R. 1055, Ex. 1, 1123.)

The very first report which we received under this plan enabled us to increase our price $6 per thousand on a special item in oak. We had just taken on a small order at what we thought was a satisfactory price, but discovered immediately that others were getting more money, and since that time we have booked orders for a number of these special items at an increase of $6 per thousand. (R. 1055, Ex. 1, 1128.)

The morning he came [the customer] we received the first report of the open competition plan giving the market prices as they do now. When this buyer came, we turned to this pamphlet and put $2 per M more than we intended to ask. * * * (R. 1055, Ex. 1, 1127.)

By watching the reports of others and keeping up on the weekly bulletins we have been able to close out our dry stock at from $1 to $3 above the general quotations. (R. 1055, Ex. 1, 1129.)

The information we get from these reports enables us to market our lumber at better values than we could secure without such information. (R. 1055, Ex. 1, 1137.)

By being able to keep posted we feel that we are able to get enough additional money over former prices for our stock that we can afford to cut out wholesaling and personally we think the plan is great. (R.1055, Ex. 1,1136.)

We believe that we have profited from $500 to $1,000 in the past 30 days by being informed correctly relative to the prices stock is really being sold at. (R. 1055, Ex. 1, 1135.)

Relative to the open competition plan, since we have become members, we have been selling our lumber at several dollars per M more than formerly and we are perfectly satisfied with the plan. (R. 1055, Ex. 1, 1134.)

Important excerpts from those letters were reprinted with approval and distributed among the defendants in the bulletin for June 7, 1919. (R. 1080).

Additional evidence of the purpose of using reports of prices received *as a guide in enhancing prices* is found in two special bulletins as follows:

MEMPHIS, TENN., *July 11, 1919.*

To the members:

We realize that on a market like we are having to-day that it is of the *utmost impor-*

tance that we get information to the members promptly as to actual sales reported to the association.

You will, therefore, doubtless be interested in the following list of *high sales* reported to the association for this week from the southern territory. [Italics ours.] [Here follows a list of the high prices reported.] (R. 1238.)

MEMPHIS, TENN., *July 19, 1919.*

To the members:

The following are a few of the *high sales* reported to the association and which will appear in the sales reports of this date. [Followed by a list of high prices reported.] (R. 1239.) [Italics ours.]

b. ORAL DISCUSSIONS OF PRICES RECEIVED.

The bulletin of February 3, 1919, explained the importance of the monthly meetings, as follows:

> Open competition means not only open prices but open discussion. Under this plan the members meet monthly at community meetings. The spirit of cooperation developed at these meetings has been of prime importance, not only in the success of the open competition plan but in the success of other association activities. (R. 1057.)

The bulletin of March 22, 1919, indicated the *method to be followed in discussing prices* at the monthly meetings, thus:

> It is one thing for men in a meeting to say, one after another, "My price is so and so," with the result that after the meeting all their prices prove substantially the same as the figures mentioned.

> It is quite a different thing for the same men to come to a meeting and each report "My actual sales for the past month have been so and so, and I have reported the details of each transaction to the association." * * * There is no agreement to follow the practice of others, although members do naturally follow their most intelligent competitors, if they know what these competitors have been actually doing. (R. 1066, 1067.)

The bulletin of April 19, 1919, again emphasizes the importance of the discussions at the monthly meetings, thus:

> Open competition means not only open prices but open discussion and the spirit of *cooperation* developed at these meetings has been of prime importance * * * (R. 1072.)

Another bulletin declared:

> Cooperation is a matter of business because it pays, because it *enables you to get the best price for your product.* (R. 1071.)

A defendant explained how the discussions at the monthly meetings tended to raise prices, in a letter to the "manager of statistics" dated May 29, 1919, stating that:

> *We have always left these meetings feeling that we did not get enough money for our lumber and that we ought to try to do better.* (R. 1055, Ex. 1, 54.)

Another defendant in a letter to the "manager of statistics" explained in detail how the reports and discussions at such a meeting would *induce a member*

to exact higher prices than he previously considered entirely satisfactory, thus:

> The writer attended the meeting at Jackson on last Friday, and when he went to Jackson was anxious to sell some No. 2 gum at $18 per thousand. After the meeting the office called him over the telephone, saying they had wire inquiry for No. 2 gum and asked what price to quote customer. Acting upon information obtained at this meeting, he advised the office to quote $20 f. o. b. mill, and received an order for 100,000 feet on this basis. If no other benefits were derived from this meeting the trip was worth exactly $200 to us. I was also under the impression that $60 was a good price for first and second plain oak, but after the meeting I quoted on an inquiry for this and raised my price $7 per thousand and received the order. (R. 1055, Ex. 1, 11.)

The minutes of the meeting of January 21, 1919, show that the chairman discussed the *prices* of specific items of hardwood lumber, urging that they should be increased, whereupon there followed a general discussion participated in by all present. (R. 93, 94.)

The minutes of the meeting of February 11 show an extended discussion, in the course of which various members present mentioned *prices received* for specific items. (R. 96.)

The minutes of the meeting of February 24 show an extended discussion, in the course of which various members stated the *prices* at which they were holding specific items. (R. 100.)

The minutes of the meeting of March 7 show that the "manager or statistics" explained that the wartime advance in the price of lumber had only amounted to 50 per cent, in comparison with an advance of 200 per cent in the price of steel, followed by a general discussion participated in by all members present. (R. 103.)

The minutes of the meeting of April 11 show a discussion of "market conditions" participated in by all members present, in which various members stated that they were holding their stock for *higher prices.* (R. 114, 115.)

The minutes of the meeting of May 9 show a discussion of certain items which developed the opinion that the spread between them in *price* was not sufficient. (R. 122.)

The minutes of the meeting of May 13 show that the chairman compared prices on certain items at Cairo with those on the same items at Cincinnati, so as to show that the Cairo *prices should be raised,* whereupon "a discussion of market conditions" followed. (R. 125.)

The minutes of the meeting of May 21 show a general discussion of "market conditions," wherein various members made specific reference to items which they were successfully holding at *high prices.* (R. 128, 129.)

The minutes of the meeting of May 23 show a discussion of "market conditions" in which mention is made of *prices which were being secured.* (R. 131.)

The minutes of the meeting of May 27 show a discussion in which selling prices for specific items were mentioned, and the possibility was considered of holding stocks for *higher prices.* (R. 135.)

The minutes of the meeting of June 10 show a discussion of "market conditions" in which *selling prices* actually received for specific items were mentioned. (R. 139, 140.)

The minutes of the meeting of June 24 show a discussion of "market conditions" in which mention was made of *prices which ought to be received* for certain items. (R. 146, 147.)

The importance which the defendants attributed to the oral discussion of high prices is shown by correspondence concerning a project of holding the meetings weekly instead of monthly:

On July 17 the "manager of statistics" stated in a letter to counsel:

> I am sure you will be gratified to learn that the southern members have become very much interested in the open competition plan. In fact, they have become so much interested that instead of holding monthly meetings in Memphis we are now holding meetings here in Memphis on Friday of each week.

The letter then explains that the printed "Sales reports" were sent out on Thursday, covering sales reported up to the previous Saturday, so that they did not reach the members until about a week after the sales took place. The letter then continues:

> I have been asked to prepare and read at these weekly meetings * * * and make a

> report of the *high sales* that are in the office which will go in the following week's report. The purpose of this is to see that members get up to the minute information as to the *high sales* reported to the association. (R. 1240, 1241.) [Italics ours.]

Although the defendants soon abandoned the *special* reports of high sales at the weekly meetings, the efforts for such reports show that there was a purpose to bring about advancement of prices on the basis of the highest prices reported as received by the defendants.

3. COOPERATIVE ENHANCEMENT OF PRICES THROUGH EXCHANGING ORAL AND WRITTEN PREDICTIONS OF ENHANCEMENT.

Evidence of the exchange of *oral predictions* that prices would be enhanced is found in the minutes of the monthly meetings.

The minutes of the meetings of July 11 report a consensus of opinion for higher prices, as follows:

> It is the *consensus of opinion* that the market for hardwood lumber will continue strong for some months to come, and *prices will be better* within the next 30 to 60 days than they are now. (R. 152.) [Italics ours.]

The minutes of July 18 show a discussion of "market conditions" reported in part as follows:

> Frequent *price advances* have been accepted by the buying trade and the demand continues strong enough to take up practically every item in dry lumber that can be obtained. (R. 155.)

The minutes of the meeting of August 8 contain the following:

> It is the *prevailing opinion* that the market will remain good for the next few months. (R. 159.) [Italics ours.]

The minutes of the meeting of August 12 contain the following:

> It is thought that present *prices will hold or go even higher.* (R. 162.) [Italics ours.]

The minutes of the meeting of August 15 contain the following:

> It is the *prevailing opinian* that the market will continue to be good for the next few months. (R. 164.) [Italics ours.]

The minutes of the meeting of August 20 report a discussion resulting in a consensus of opinion that the market would continued good:

> The outlook for the next few months brought forth an interesting discussion. It was the *consensus of opinion* that the market will continue to be good for the next few months. (R. 166.) [Italics ours.]

Evidence of the continuous exchange among the defendants of *written predictions* that prices would be maintained and enhanced is found in their *answers to the monthly questionnaire* containing the question "What is the general outlook for business?" These answers were mimeographed and *distributed amongst the defendants each month.* The constantly increasing importance of this feature of the defendants' cooperative activities is indicated by the increase in the num-

ber of answers received and mimeographed from 24 in February, 1919, to 109 in February, 1920.

We quote below a *few typical answers*, as mimeographed and distributed among the defendants, *for each month* of the period covered by the bill of complaint; together with a *few words from each one of the answers* mimeographed and distributed for the month of *February, 1920*. If allowance is made for the vastly greater number of similar answers which we do not quote, this will give some idea of the influence exerted, upon an individual defendant, to exact constantly increasing prices, by the assurance increasingly voiced by large numbers of the defendants that prices would be maintained and enhanced.

February, 1919, 24 answers (R. 242, 243), including:

> 43. Pelican: Inquiries indicate brisk buying at this time with effort on the part of buyers to weaken prices; only a question of proper methods for stabilizing prices.
>
> 62. Brewer-Nienstedt: If manufacturers will hold steady and not allow wholesalers to stampede them believe will have good business in 30 days.

SUMMARY BY "MANAGER OF STATISTICS."

> The general outlook for business appears very bright—buyers are learning that the high cost of manufacturing lumber is a fact and that prices can not go lower. Look for material improvement in 60 to 90 days. (R. 243.)

First group for March, 1919 (R. 262, 263), 27 answers:

> 99. Smoot: Don't look good; buyers demanding lower prices. We can only sell on reduction in price.

SUMMARY BY "MANAGER OF STATISTICS."

> Outlook fair. Everybody feels that good business is not far ahead. A stabilized market for all commodities will help and is greatly desired by both buyer and seller. (R. 263.)

Second group for March, 1919 (R. 281–283), 33 answers, including:

> 16. Paepcke Leicht: If operators continue to hold firm on prices a few more weeks, look for general market to start on upward trend.
>
> 39. Jas. E. Stark: Consider general outlook good and believe immediate business would be satisfactory, were it not for a good many mills quoting ridiculous prices.
>
> 142. Nickey Bros.: Immediate future not good, but quite optimistic about the outlook for three or four months ahead. If mills would hold their lumber and not cut prices business would be better.

First group for April, 1919 (R. 302, 304), 29 answers, including:

> 1. American-Column: Outlook is for increasing demand with higher prices later.
>
> 54. Bristol: Very encouraging.

SUMMARY BY "MANAGER OF STATISTICS."

> The general opinion seems to be that conditions are improving and that there will be a

demand for stock before very long at higher level of prices. (R. 304.)

Second group for April, 1919 (R. 322, 324), 29 answers, including:

23. Wisconsin: We are optimistic in view of curtailed production and think shortage of stocks will take care of prices until demand improves.

137. Kellogg: We think things are going to pick up soon. We don't expect to cut prices.

139. Triangle: Building operations improving slightly and no doubt will go ahead very rapidly as soon as builders realize that there is to be no reduction in prices.

151. E. Sondheimer: Very good. Consumers seem ready to buy now at present prices. Not so much waiting for prices to go down.

SUMMARY BY "MANAGER OF STATISTICS."

Conditions seem to be steadily improving and that demand and price should be good throughout the year. (R. 322–324.)

Third group for April, 1919 (R. 340), 19 answers. Examples:

45. Hillyer-Deutsch: Prospects bright.

118. Eastman-Gardiner: With stocks as scarce as they are we see no reason why prices should be cut at all.

125. J. H. Coffman: Good; decreased production.

SUMMARY BY "MANAGER OF STATISTICS."

Almost unanimous opinion that conditions are bright for the near future. (R. 340, 341.)

First group for May, 1919 (R. 360, 363), 39 answers. Examples:

> 31. Lee Wilson Co.: Good. Manufacturers who have been waiting for a decline in prices realize that there will be no decline for several months.
>
> 73. Wineman: Do not look for lower prices for some time, if at all this year.

SUMMARY BY "MANAGER OF STATISTICS."

> Surely "everything comes to him who waits." Those that waited can now have their cake and eat it. Those that did not wait—well, they must eat at the second table. If ever there was a time when conditions for the hardwood industry looked good, that day is here. (R. 363.)

Second group for May, 1919 (R. 382, 383), 28 answers. Examples:

> 149. Iatt: Good; low stocks; poor labor and active export.
>
> 159. Holly Ridge: Outlook for business fine; in fact we have raised our prices $3 to $5 per M, due to depleted stock and low production.

SUMMARY BY "MANAGER OF STATISTICS."

> General outlook good and if shipping could be provided for export demand, the present supply would soon be exhausted. (R. 383.)

Third group for May, 1919 (R. 398, 399), 17 answers. Examples:

> 67. Faust Bros.: Good, especially oak. We are offered orders at advanced prices.

SUMMARY BY "MANAGER OF STATISTICS."

The general outlook is decidely better. Buyers realize now that dry stocks are scarce and prices not going lower. (R. 399.)

First group for June, 1919 (R. 420–422), 31 answers. Examples:

7. D. E. Hewitt: Consider outlook very bright with considerable advance in prices on No. 2, common and better grades.

30. Meadow-River: The best that we have known in our history. See nothing in view to limit demand and good prices for the remainder of the year.

54. Bristol: Outlook extremely good with prices advancing.

96. Pardee-Curtin: Exceptionally good. Export business is sure to draw a good percentage of the production, which ought to keep prices up—the present or even higher basis.

119. Mt. Lick L. Co.: Very good, Believe that prices will steadily increase during the next few months.

Second group for June, 1919 (R. 450–452), 29 answers. Examples:

6. Gideon-Anderson: Never was better than now; for next six months only danger is overproduction this summer.

23. Wisconsin: There is a remarkable prospect ahead of the industry if production can be held down to normal during summer and fall months when logging conditions improve.

142. Nickey Bros.: Extreme shortage of lumber will keep prices up and keen demand

for furniture, autos, with considerable building makes the lumber business beautiful and attractive indeed.

Third group for June, 1919 (R. 466–467), 19 answers. Examples:

43. Pelican: Splendid. We can see no reason why buying for all requirements should slacken, even at advanced prices.

67. Faust Bros.: Excellent. Big demand from export wholesalers. Furniture factories in market for big volume. Demand better at advanced prices.

SUMMARY BY "MANAGER OF STATISTICS."

There is no indication of a let-up of the present satisfactory conditions. Continued heavy demands from all sources at advanced prices is apparent. (R. 467.)

Fourth group for June, 1919 (R. 481), 9 answers:

SUMMARY BY "MANAGER OF STATISTICS."

General outlook is very good. Continued unfavorable weather in this territory has interfered greatly with the production of lumber while the demand continues to be heavy. (R. 481.)

First group for July, 1919 (R. 506–511), 48 answers. Examples:

8. Himmelberger-Har: In our opinion the market for hardwood lumber will continue strong and prices will be better within the next 30 to 60 days than they are now.

11. Lamb-Fish: Constant advances fail to stop orders, we quoting export prices to domestic trade and same being accepted.

150. Alexander: Demand will exceed the supply and at prices now prevailing or better. Our business outlook is good.

204. Coulson: Good, with advancing prices caused by increasing demand and low stocks.

EXCERPT FROM SUMMARY BY "MANAGER OF STATISTICS."

The prevailing opinion is that the market will remain strong for some months to come. The demand continues heavy in the face of frequent price advances. (R. 511.)

Second group for July, 1919 (R. 528–530), 19 answers. Examples:

45. Hillyer-Deutsch: Can not be anything but good. Short stocks, heavy demand in both export and domestic trade coupled with good crops and plenty of money in circulation and very likely severe car shortage will enable manufacturers to put their own prices on anything they can ship.

123. Dorsey: See no reason why the demand should not continue good and high price level maintained.

Third group for July, 1919 (R. 546–548), 17 answers. Example:

150. Alexander Bros.: Demand will exceed the supply and at prices now prevailing or better. Our business outlook is good.

SUMMARY BY "MANAGER OF STATISTICS."

> There is nothing to indicate other than a continued good business for some time to come. Frequent price advances have been accepted by the buying trade, and the demand is strong enough to take up practically everything that can be obtained. The general outlook is exceptionally good. (R. 548.)

Fourth group for July, 1919 (R. 564–565), 13 answers. Example:

> 123. Dorsey: See no reason why the demand should not continue good and high price level maintained.

First group for August, 1919 (R. 583–586), 34 answers. Examples:

> 13. Little River: Outlook very good; dry stocks very scarce and demand increasing. It is our opinion prices will go higher; at least maintain present level.
>
> 107. Ranwood: There will be all the business we can handle at good prices.

EXCERPT FROM SUMMARY BY "MANAGER OF STATISTICS."

> Reports indicate a general feeling of confidence for the next few months. It is thought that the present prices will hold or even go higher. (R. 586.)

Second group for August, 1919 (R. 625–627), 22 answers. Examples:

> 30. Phil A. Ryan: Think they will stand at about present level.

60. Sabine Tram: We think prices will continue strong on account of depleted stocks and continued demand.

125. J. H. Coffman: Rather pessimistic, on account labor conditions in the east.

199. Lake Swayze: Good, can not see anything but good price and good demand.

SUMMARY BY "MANAGER OF STATISTICS."

It is the prevailing opinion that the market will continue to be good for the next few months. The demand is still in excess of the supply and there is no probability of an immediate production great enough to catch up. Some apprehension is being expressed because of the unsettled labor conditions and its possible effect on business in general. (R. 627.)

Third group for August, 1919 (R. 639–640), 17 answers. Examples:

59. New Deemer: We can see no reason for a decline, and a perusal of last month's stock list is very convincing proof of a further advance.

168. Henry Maley: Splendid outlook for business. Believe prices will remain high, account of scarcity of material.

Summary by "manager of statistics" same as for second group. (R. 640.)

Fourth group for August, 1919 (R. 652–653), 14 answers. Examples:

182. Gates: I think business will be better as there is no dry stock and most of the lumber

on yard is sold, and anyone can get any price he wants. Buyers are as thick as thieves.

237. Cash Trading: Outlook good. Big demand with good prices.

Summary by "manager of statistics" same as for second group. (R. 653.)

First group for September, 1919 (R. 664,665), 15 answers. Example:

34. Vestal: Our present prices are high. We look for prices to stand until January, 1920. Our orders are coming in slower.

EXCERPTS FROM SUMMARY BY "MANAGER OF STATISTICS."

Production is still below normal and there are no immediate prospects of a full production. No price recessions are looked for, although the extremely high prices on some items may not hold. (R. 665.)

Second group for September, 1919 (R. 683, 688), 49 answers. Example:

82. Chgo. Lbr. & Coal: Expect conditions to remain about same during fall months with prices remaining firm.

EXCERPT FROM SUMMARY BY "MANAGER OF STATISTICS."

Prices are not expected to go higher but present values should be maintained. (R. 688.)

Third group for September, 1919 (R. 700, 701), 16 answers:

49. Freeman-Smith: We believe we are going to sell all hardwood we can produce at

good prices. While there may be some lower prices on certain items we look for no material reductions for next several months.

123. Dorsey: We are afraid the campaign now on to lower the cost of living will affect the market.

164. So. Drainage: Expect good demand and prices for next four months.

EXCERPT FROM SUMMARY BY "MANAGER OF STATISTICS."

Prices are not expected to go higher but most present values are expected to hold. (R. 701.)

Fourth group for September, 1919 (R. 713, 714), 15 answers. Examples:

71. Kraetzer-Cured: With practically no fully seasoned stock on the market and no possibility yet of catching up. Can see nothing but a rosy outlook.

118. Eastman-Gardiner: Market conditions are not as good with us as they were 30 days ago. Buyers are not so keen for the stock. However, there is nothing to cause alarm and if we will only stand together there should be no slump in the market.

SUMMARY BY "MANAGER OF STATISTICS."

The market is expected to remain good for the rest of this year. Aside from a seasonable dullness reported by some, price concessions have not been necessary. There is little probability that stocks can be sufficiently replenished during the next three or four

months to have any unfavorable effect on market conditions. (R. 714.)

First group for October, 1919 (R. 726, 728), 32 answers. Examples:

53. Farris: Don't anticipate any material change in prices but a stable market. Think when export business opens up prices will advance.

93. Wright-Bachman: Good, good. Stock shortage, production below normal, and no let up to demand. Wholesalers best buyers. Best of indications of steady prices.

EXCERPT FROM SUMMARY BY "MANAGER OF STATISTICS."

There are a few reports of a let up in inquiries and a probable slight price decline, but the prevailing opinion is that the business outlook is very good. (R. 728.)

Second group for October, 1919 (R. 746, 751), 50 answers. Examples:

31. Lee Wilson Co.: Unsettled; fair. Labor conditions are such that concerns are holding off buying. Also prices are so high concerns are not buying.

44. Rush L. Co.: Do not think there will be much change in prices. Think they are becoming about stationary, which justifies more freedom in both buyer and seller in placing orders for future delivery. No reason to cut prices.

160. H. D. Glass: Good, good. Shortage of dry stocks on hand at present and no falling off in prices.

204. Coulson: Look for good business at present prices, providing lumbermen do not get uneasy and cut prices. Stocks are low and the demand is good.

Third group for October, 1919 (R. 764, 765), 12 answers:

118. Eastman-Gardiner: Our idea is, all we have to do is to stick together and we will be able to keep the market in good shape.

Fourth group for October, 1919 (R. 779, 780), 22 answers. Example:

199. Lake Swayze: See no chance for decline and are of the opinion market should be better and prices upward.

Fifth group for October, 1919 (R. 793, 794), 14 answers. Examples:

181. Jones & Dunn: Good; very promising. Shortage dry stocks, and unable to supply mills with logs.

229. T. A. Thomas: Demand and prices should continue about as they are. Business should be brisk, provided labor strikes can be settled.

First group for November, 1919 (R. 808, 812), 32 answers. Examples:

34. Vestal: General outlook good. We now predict good business at the same level of prices for first six months 1920.

94. Spice Run: Market more stabilized. Present level of prices maintained for several months at least.

138. J. W. Darling: Believe prices will hold firm. Reason, scarcity of dry stocks.

From this point on the answers to the question rapidly became an almost continuous chorus of assurances that prices would continue high, interrupted by occasional warnings that this would reduce consumption.

Second group for November, 1919 (R. 829, 834), 47 answers. Examples:

> 23. Wisconsin: Depends greatly on labor conditions. Prices are going higher on account of recent rains and stock shortage which will result.
>
> 144. Mfs. Band Mill: On account of the serious conditions of logging, manufacture, and traffic with small stocks and a tremendous demand, prices are bound to be stable. We believe new high marks will be recorded.
>
> 195. Grismore-Hyman: There seems to be no let up in the demand and we look for prices to go sky high.
>
> 278. F. T. Dooley: Will remain firm; some items advancing. Good shortage of dry lumber and curtailed production on account of excessive rains.

Summary by "manager of statistics" same as above for first group. (R. 834.)

Third group for November, 1919 (R. 845, 846), 9 answers. Example:

> 118. Eastman-Gard: We are optimistic. The outlook is better than it has been during the present year.

Fourth group for November, 1919 (R. 860, 861), 21 answers. Examples:

> 30. P. A. Ryan: Wild; no limit; no lumber; very little productions; abnormal demand.

Any one that has lumber need only sit still and let buyers bid.

63. Wilson-Cochran: Prices will be higher than ever before and there is nothing in sight to stop the demand.

88. H. G. Bohlssen: Good. No stocks and demand heavy.

Fifth group for November, 1919 (R. 875, 877), 20 answers. Examples:

182. Gates: We believe the market is stronger than ever and with the wet weather we have had and the winter on us and no logs on hand, prices are going $15 to $25 higher.

206. Edgar: Steady advances with unheard of values within 60 to 90 days if weather conditions do not improve.

214. Deep Bayou: Extremely good, early fall rains making logging almost impossible. No chance to accumulate big stocks before the summer of 1920.

SUMMARY BY "MANAGER OF STATISTICS."

Stocks extremely short and the demand strong assures a continued good market for the next few months, or longer. There is little probability of any considerable increase of stocks on hand until well toward the summer of 1920, and the demand shows no signs of weakness at the present time. (R. 877.)

Answers for December 1 are not shown in the record.

First group for January, 1920 (R. 901, 905), 43 answers. Examples:

35. Big Salkehatchie: In the next few months we look for better demand, a shorter supply, and higher prices.

114. No. Vernon: Same. Conditions never more favorable. Consuming factories loaded with orders and most furniture factories now taking open orders. No price quoted, stock to be invoiced at market prices when shipment is made. This relieves them of loss from advancing markets on raw materials. All other lines in splendid shape.

Second group for January, 1920 (R. 928, 932), 48 answers. Examples:

139. Triangle: The growing demand and advancing prices will most certainly continue with the continued decrease in production. In our opinion prices are now low compared to what they will be in the early spring.

164. Sou. Drainage: Looks good to us. Reason, no logs, no stocks.

171. Woods: Market outlook is good. Think high prices will continue for several months.

303. L. N. Kimerer: Extremely good. Labor condition becoming unsettled. Very low stocks of lumber on hand, very few logs and poor logging conditions. Plenty of money in the country. Hardwood timber growing scarcer and all the biggest tracts in strong hands

Third group for January, 1920 (R. 952, 954), 25 answers. Examples:

118. Eastman-Gard: We see no reason why the market should not remain good for almost and indefinite period, for, as everyone knows, there is a decided shortage of hardwood lumber

on sticks, and production for the next two or three months certainly will be less than it has been for the last few months; and with low stocks all over the country we see no reason why we should not have a very prosperous period.

Fourth group for January, 1920 (R. 970, 971), 14 answers. Examples:

179. Campbell-Hedges: Going higher; demand far greater than supply. No logs; bottoms very wet.

182. Gates: I can't see any reason for a standstill in price as there are no stocks on hand and prices are sure to go on up and no one ever refuses to pay just what you quote.

SUMMARY BY "MANAGER OF STATISTICS."

Replies to this inquiry indicate that there is every prospect for a continued good business for some months to come. The demand for hardwoods continues strong and as there is no probability of a production to balance the insistent demand it is apparent that stocks of hardwood lumber will be eagerly sought for by the consumers. There is some apprehension of danger in the present high price levels, and its probable result in discouraging building operations and turning the attention of some lines of trade to wood substitutes. (R. 971.)

In February, 1920, 109 answers to the same question were received, mimeographed, and distributed in four groups. (R. 990–992, 1016–1020, 1036–1037, 1051–1052.) In order to give in brief compass an *accurate and comprehensive view* of these answers,

just before the suit was begun, we quote *a few words from each one*, as follows:

> Market conditions look O. K.—all looks favorable, with still higher prices—out of sight; the users of lumber are actually begging for lumber, price no object—odds in favor of some higher prices—can see nothing but strong demand as a result of shortage—market should therefore be a seller's market—every indication points to further advance in price during next few months—good; lumber stocks very low; weather very unfavorable—good—we look for even higher prices—we hardly expect any radical decline within the near future—good; general scarcity of stocks and continued demand—market should hold for next 60 days—see no reason to anticipate an early let-up—we look for market to be good for coming three months—general outlook is good—prices will be high—see no reason why market should not remain as strong for several months as at the present time—good, if we could produce the lumber—prices are bound to go higher—very good; bad weather has reduced log supply and stocks of lumber at mill are very low—good, prices will hold or improve—it looks good from inquiries and no dry stocks at any of the small mills in this part of the country. (R. 1036–1037.)
>
> Don't believe prices will drop—prices will continue high—market conditions should continue good—market conditions should remain good—prices can not decrease—general outlook excellent—think lumber will remain

at present level—think next few months will remain as now—lumber scarce and prices strong for 90 days—see nothing but good prices for several months—good; reason, supply and demand—prices can not go lower—present prices likely to remain high with strong demand; will be some advances for special stocks—general confidence in present market. (R. 1051–1052.)

Prices may go a little higher—see no reason for any decline in prices—may possibly be some further improvement in prices but believe the top has been reached—we can't see anything but good business—continue good—prices will remain strong; perhaps even increasing over present prices—market conditions still look good on account of demand and shortage of lumber—means present prices or higher—look for good business during next few months—supply low, production under normal—market conditions should be good for at least eight months—demand will exceed the supply for some months to come—see no reasons why prices should not remain same if not advance—business will continue good—good; reason shortage of production and good demand—good; can see nothing ahead but upward tendency—look for still higher prices—continued good business—conditions should remain firm—think market will be good—demand and prices will be good—looks good to us; great log shortage in the section due to continual rains, has restricted production—good for all of 1920—outlook good—will go higher—market will continue strong—very favorable—

good—good—higher prices on most items—outlook good; supply below demand—market will continue to advance—prices will hold, many items will advance—good; principally because there is not enough goods to supply demand—may change overnight due to continuous skyrocketing of prices—good for four months—we expect to sell all we can manufacture at increased prices—good—good; present supply of logs and lumber very good—national or world financial conditions only thing to prevent a very large demand for lumber throughout the spring months—market conditions should be good for the next six months—if any change prices will go higher—will remain firm. (R. 1016–1020.)

If prices continue to rise will injuriously affect lumber industry—outlook very promising, stocks are short—looks good—prices will remain high—will continue good—our opinion is that prices are too high—demand will continue far in excess of supply—for the next five months at least all hardwoods available and offered for sale will be snapped up—fine until September 1—as long as present famine of dry lumber exists prices are certain to advance or at least maintain present high level — outlook good, account shortage of stock—outlook for spring business very good—no slackening in demand, and increased values—very fine—good, price of lumber high because of shortage of stocks caused by flooded condition in hardwood section of the South—we think conditions seem favorable—demand will hold up—outlook very good—

business to be about the same—appears good—we look for good demand with higher prices—will be very good in our opinion—think the market will be good until about July 1—looks good to me—we anticipate a remarkable demand for all kinds of lumber and at good prices—good demand—looks good to us—present high prices will prevail until late in the fall—prices will hold up. (R. 990–992.)

THE DEFENDANTS' EVIDENCE.

There were introduced in evidence affidavits by 60 of the defendants denying that they made any agreements as to prices to be charged; and affidavits to the effect that there was a shortage of hardwood lumber attributable to unfavorable weather conditions, labor conditions, and transportation difficulties; and affidavits containing opinions that the enhancement of prices was due to such shortage, and not to the defendants' cooperative efforts.

Further evidence introduced by the defendants will be referred to so far as necessary in the course of the argument.

There was no evidence in rebuttal by the plaintiff.

THE FINDINGS, DECREE, AND DENIAL OF SUPERSEDEAS BY THE DISTRICT COURT.

The District Court, in a well considered opinion, reviewed the evidence, found that the defendants had engaged in a conspiracy to suppress competition and maintain and enhance prices, and held that such conspiracy was in restraint of trade, in violation of the Sherman Antitrust Act. (R. 1731–1740.)

The decree of the District Court enjoined the defendants from continuing their reports, discussions, and predictions, written and oral, concerning stocks, production, and prices. (R. 1751–1762.)

The District Court denied an application by the defendants for a writ of supersedeas. (R. 1762, 1763.)

DENIAL OF SUPERSEDEAS BY THE SUPREME COURT.

The defendants made an application to this court for a writ of supersedeas, which was denied on June 7, 1920. (*American Column & Lumber Co.* v. *United States*, No. 970, October term, 1919.)

THE ASSIGNMENTS OF ERROR.

The essential assignments of error may be grouped together as raising the following points (R. 1763–1765):

(1) The District Court erred in finding that the defendants entered into a combination fixing or enhancing prices or curtailing production. (Assignments of Error 4, 5, and 6, R. 1764.)

(2) The District Court erred in enjoining the defendants from compiling and distributing the "stock reports," "production reports," and "sales reports," and from discussing past and future prices, and from exchanging predictions as to prices, without limiting the injunction so as to prohibit the doing of those things only when done as a means of carrying out a combination to suppress competition or curtail production or enhance prices. (Assignments of Error 7, 8, and 9, R. 1764.)

(3) The District Court erred in framing injunctive provisions of the decree in vague and general terms. (Assignment of Error 10, R. 1764.)

It is evident from the assignments of error that the case does not present an *abstract* or *general* question as to the validity of the furnishing of information through the medium of trade associations, as suggested in defendants' brief, but *concrete questions relating to the present case.*

The *basic* questions are whether this court shall disturb the District Court's *finding of fact* that the defendants entered into a conspiracy suppressing competition and maintaining and enhancing prices, and *conclusion of law* that such a conspiracy was illegal.

A *subsidiary* question is raised as to whether the District Court properly exercised its discretion in enjoining the defendants *absolutely* from continuing their practices, in view of the apparently inseparable connection between those practices and the unlawful conspiracy.

The point raised that the decree is vague, is so obviously ill-taken that we shall not argue it.

II.

ARGUMENT.

THE CONSPIRACY IN ITS UNDISPUTED ASPECT.

It is undisputed that the defendants conspired together in that they agreed in becoming members

of the so-called "Open Competition Plan," and, as such, in conducting meetings and oral discussions concerning past and future prices, stocks, and production, and in compiling and distributing among themselves the monthly and weekly reports and bulletins concerning prices, stocks, and production, and the monthly answers to questionnaires, consisting essentially in predictions that prices would go higher.

ARGUMENT AS TO THE FACTS.

The Government contends that the defendants conspired together in agreeing to conduct their cooperative activities *with the purpose of suppressing competition and maintaining and enhancing prices and in such manner as to effectuate that purpose.*

THE PURPOSE WAS TO SUPPRESS COMPETITION AND MAINTAIN AND ENHANCE PRICES.

In considering the evidence it will, of course, be remembered that where a *conspiracy* exists the declarations of one of the conspirators admissible as evidence against him are likewise admissible against the other conspirators.

Thus, declarations by the "Manager of statistics," one of the conspirators in this case, manifesting the purpose of suppressing competition and maintaining and enhancing prices through the cooperative activities under consideration, are evidence against all the parties to such activities. Such declarations have added weight as evidence against the defendants beause the "Manager of statistics"

was acting as their representative when he made the declarations, and they were incorporated in official bulletins or "market letters" constituting an important feature of the plan, and they were never repudiated before this suit.

So too, declarations by various other defendants manifesting the said purpose are evidence against all the parties to the plan, and have added weight as evidence where they were adopted and approved by the "Manager of statistics," reprinted and distributed among all the members of the plan as showing benefits to be derived from participation therein, and never repudiated before this suit was begun.

The plan as attacked in the bill of complaint began in January, 1919, as an outgrowth of a previous plan which had apparently existed without attaining formidable proportions during the two preceding years.

The purpose of maintaining and enhancing prices by eliminating low-priced competition among the members was thus explained in the *original draft* of the plan, prepared by a committee appointed by the board of governors of the Hardwood Manufacturers' Association, and approved by that board on January 29, 1917:

> The open competition plan has been in operation in various industries with signal success. Manufacturers have learned that by helping their competitors, they help themselves. They have learned that *the low-priced*

competitor makes the market and that the low-priced competitor does not make such prices because he wants to be low priced, but because of either lack of information as to market conditions or because of an inferior product. Open competition gives the competitor that information which he has lacked and his desire to get the most possible for his product can be safely relied upon as sufficient incentive for him to get the market price. If his low prices are due to an inferior product or poor service to his customers, he will find it out when he tries to discover why his prices are not in line with his competitor's and through the general discussions at the regular meetings.

There is more than one case on record where a large concern has at its own expense employed experts to put in cost systems for competitors and to show competitors how to bring their products up to a high standard. They did it from no philanthropic motives, but because they knew that a poor competitor weakens the market and *thereby reduces the prices at which they must sell their products.* (R. 1227.) [Italics ours.]

There follows in the original draft a description of the plan, comprising the monthly "production reports," "stock reports," and "sales reports" showing prices received by each member on each sale, monthly meetings for purposes of discussion, and bulletins or "market letters."

The foregoing shows the original purpose of the plan to eliminate low-priced competition among the members by means of the cooperative activities

described. That purpose was always constantly adhered to, as thus stated by the "manager of statistics" in an affidavit filed in the present suit:

> From that time on until the present hour the plan has functioned under the auspices of the American and in the same manner and for the same purpose as under the auspices of the Hardwood Manufacturers' Association. (R. 1100.)

The purpose of the plan to replace competition by cooperation and thus enhance prices was again set forth, in the opening statement published in volume 1, No. 1, of the "sales reports" on January 25, 1919, as follows:

> COOPERATION, NOT COMPETITION, IS THE LIFE OF TRADE. That is a modern business slogan, with a twentieth century ring to it. And it explains why one of the most significant and widespread movements among the business men of America during the past ten years has been that towards organization. * * * Membership in the plan is not compulsory, but members who enter into the plan and practice the idea of a fair deal for all, eliminating suspicion and acting with good will towards each other, will find that returns come back to them with *added interest in dollars and cents*. (R. 33 Ex. A, first page.) [Italics and capitals ours.]

The purpose of the plan to replace competition by cooperation as a means of enhancing prices was

reiterated in the bulletin or "market letter" of April 12, 1919, as follows:

> The Open Competition Plan of the American Hardwood Manufacturers' Association is today one of the largest, if not the largest, both in membership and volume of business reported, open price plan in existence. * * * An open competition plan is not an easy thing to operate successfully. On the contrary, it is one of the hardest things imaginable to carry on among a body of business men who have been used to the old formula "Competition is the life of trade." * * * The keynote to modern business success is mutual confidence and cooperation. Cooperative competition, not cutthroat competition. *Cooperation is a matter of business, because it pays, because it enables you to get the best price for your product,* because you come into closer personal contact with the market.
>
> Cooperation will only replace *undesirable competition* as you develop a cooperative spirit. For the first time in the history of the industry the hardwood manufacturers are organized into one compact, comprehensive body, equipped to serve the whole trade in a thorough and efficient manner. * * * *With cooperation of this kind we will very soon have enlisted in our efforts practically every producing interest, and you know what that means.* (R. 1070, 1071.) [Italics ours.]

The purpose of using the cooperative reports to enhance prices was again shown, in the bulletin or "market letter" of March 8, by reprinting, *with ap-*

proval, an article which referred to the defendants' "production reports" showing a shortage of lumber, and plainly intimated that such reports were to be used as a basis for charging higher prices in saying—

> *With this information before him*, it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to the *proper course for him to pursue in selling his lumber*. (R. 1064, supra 12. [Italics ours.]

The same purpose was again shown in the bulletin or "market letter" of March 29, which openly encouraged the defendants to exact higher prices on the basis of the "stock reports" showing a shortage of production, thus:

> Reliable statistics gathered by this association indicate that stocks on hand at present are only about 60 per cent of normal. * * * Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman if the facts were better understood; offers of business now at shaded prices would get scant consideration. * * * Manufacturers naturally are *not going to sell very far ahead at the present level of prices.* (R. 1068, supra 13.) [Italics ours.]

So, too, the bulletin or "market letter" of April 29th exulted in the showing of a shortage of lumber in the "production reports," and disclosed that the reports of the shortage were to be used as a basis for procuring higher prices, thus:

> If there ever was a time when rich rewards awaited the producer of hardwood lumber,

> now is that time. There are *glorious opportunities ahead.* * * * Production during the month of April was a little *less than 60 per cent of normal.* * * * The demand is with us, the supply inadequate; therefore, *values must increase, as our competition in hardwoods is only among ourselves.* (R. 1073, supra 13.) [Italics ours.]

In like manner the bulletin or "market letter" of May 24th emphasized the shortage of stocks disclosed in the "stock reports," and encouraged the defendants to exact higher prices on that basis. (R. 1080, supra 13.)

Again, the bulletin or "market letter" of September 20th dwelt on the shortage of stocks disclosed in the reports and showed the purpose of maintaining high prices on that basis, thus:

> With these conditions prevailing there is nothing in the situation that should encourage anyone to hope for a drop in quotations. (R. 1091, supra, 14.)

Note also the further series of similar statements in the "market letters" or bulletins at R. 1082, 1084, 1087, and 1090.

The purpose of using the "stock reports" so as to enhance prices is further disclosed by the minutes of the meeting of September 7, 1919, at Cincinnati, Ohio, at which 35 companies were represented. The minutes show a discussion of the "*invaluable*" character of the "stock reports," followed by a unanimous standing vote that such reports should

be made earlier in the month, and a statement that—

> *it would have very much to do with getting better prices if members could know actual stocks on hand as quickly as possible.* (R. 170.) [Italics ours.] (Supra 11.)

The importance of the *monthly meetings*, at which it was the practice of the defendants to discuss their mutual reports of prices, stocks, and production, was thus disclosed in the bulletin or "market letter" of February 3d:

> Open competition means not only open prices but *open discussion.* Under this plan the members meet monthly at community meetings. The spirit of cooperation developed at these meetings has been of *prime importance* not only in the success of the Open Competition Plan but in the success of other association tactivities. (R. 1072; supra 21.) [Italics ours.]

The use of the monthly meetings so as to produce enhancement of prices is thus disclosed in a letter from one of the defendants to the "manager of statistics," dated May 29, 1918, wherein he said:

> *We have always left these meetings feeling that we did not get enough money for our lumber and that we ought to try to do better.* (R. 1055, Ex. 1–54, supra 21.) [Italics ours.]

In that connection note the minutes of frequent discussions of high prices at the meetings: [Supra 10, 11; 22–24.]

The importance of the meetings is again disclosed by tentative efforts made at one time to hold them *weekly* instead of monthly. In a letter the "manager of statistics" said of the proposal for weekly meetings:

> The purpose of this is to see that members get up-to-the minute information as to the

> *high* sales reported to the association. (R. 1240, 1241, supra 25.) [Italics ours.]

Although the proposal for weekly instead of monthly meetings was soon abandoned, the effort thus made to secure early information as to *high* sales indicates that the defendants' interest was centered in using the high prices reported to have been received by some as a means of enhancing the prices of others.

Letters from many defendants showed the purpose of using the "*Sales reports*" to enhance prices in explaining how the reports *were being used for that purpose.* (Supra 17–19.)

Another member disclosed in a letter that the purpose of the plan was to enhance prices, thus:

> It has kept us in touch closely with the market and in many instances has made us one or more dollars per thousand feet on lumber that we have sold and we believe that the plan is going to be very successful in carrying out *the purposes for which it is intended* and we sincerely trust that all the members will pay close attention to the information given out from your office at Memphis and if they do this we believe *it will enable us to hold prices up to where we can make some money.* (R. 1055 Ex. 1–1139.) [Italics ours.] (Supra 18.)

The foregoing brief references to the evidence are sufficient at this point to show the constant purpose to suppress competition and maintain and enhance prices through the cooperative activities in question.

The other evidence of such purpose can not well be separated from the evidence showing the effectiveness of the plan in accomplishing its purpose, and may be noted below in that connection.

The defendants' brief does not deal *directly* with the evidence showing that the purpose was to suppress competition and maintain and enhance prices, but seeks *indirectly* to avoid the effect of such evidence.

Thus the brief asserts that the defendants' plan consisted essentially in an *exchange of information*, and seeks to liken it to the compilation and distribution by the Government of statistics for certain lines of industry. But the compilation and distribution by the Government of statistical information differs essentially from the present plan in that it lacks the element of cooperation amongst competitors, the purpose of suppressing competition and maintaining and enhancing prices, and the continuous written and oral communications fostering the enhancement of prices.

Again, the defendants' brief refers to the grain, cotton, and live stock markets. But such markets are *two-sided* arrangements, in which buyers as well as sellers are engaged in consummating open sales by balancing against one another the forces tending to depress prices, as well as to enhance them; while the defendants' plan was a *one-sided* arrangement among persons cooperating solely with the purpose of enhancing prices.

Again, it is argued in defendants' brief that certain defendants at times *reduced* their prices upon referring

to the "sales reports." But such instances were *exceptional*, and out of line with the clearly declared purpose of the plan. None of numerous explanations of the plan prior to the commencement of the present suit mentioned any purpose to induce the defendants to depress their prices, but all evinced the purpose of enhancing prices.

Again, the defendants' brief emphasizes efforts made by the defendant M. F. Ritter, in the forepart of the year 1919, to reduce the prices of hardwood lumber—as if that tended to show that the prevailing purpose of the defendants in operating the plan was not to enhance their prices. But Mr. Ritter's desire to hold down prices was not shared by the other defendants, and did not induce them to abandon their efforts for enhancement. The difference between his purpose and the prevailing purpose of the defendants is shown by the expressions of *delighted satisfaction*, including such adjectives as "good," "beautiful," "splendid," and "glorious," which they emitted throughout the year 1919, and particularly in February, 1920, *when their prices had already been doubled and trebled within a year* in assuring one another that still higher prices could and would be secured! (Supra 27–47.)

In November, 1919, Mr. Ritter abandoned as useless his efforts to hold down prices, saying—

> It was clearly evident that we alone could not accomplish what we very much desired to, and which I am sure would have been the best thing for the industry in the long run;

> that is, to prevent any further inflation in the hardwoods—

and declaring that he should still endeavor—

> to prevent, by persuasion and otherwise, any further inflation; but if *the industry is not inclined to follow our suggestions*, we would be consistent in selling our commodity at the market prices. (R. 1268.) [Italics ours.]

THE EFFECTIVENESS OF THE "PLAN" TO SUPPRESS COMPETITION AND MAINTAIN AND ENHANCE PRICES.

The conditions obtaining among former competitors when this "plan" was in operation were forcefully and accurately described by one of the defendants as a "*friendly rivalry in securing the best prices,*" thus:

> There seems to be a friendly rivalry between members to see who can get the best prices, whereas under the old plan it was cut-throat competition. (R. 1055; Ex. 1–1124. Supra 18).

It is easy to see how the "plan" was effective in establishing a "friendly rivalry" among the defendants in securing the best prices. Given the purpose of doing away with low-priced competition and enhancing prices, continuous reports to one another as to prices secured, and as to rates of production and stocks on hand, stimulated and assisted each defendant to secure the highest prices. Moreover, the regular meetings at which the *reports were discussed as a basis for higher prices*, the bulletins or market letters *urging defendants to exact higher prices*, the answers to the questionnaires *assuring one another*

that higher prices could and would be exacted—all these overcame the hesitation or scruples which might otherwise have actuated individual defendants and constantly induced them to enhance their prices.

The answers to the questionnaires show that early in the year 1919, when the market was lagging, some doubt was expressed as to the possibility of securing higher prices, coupled with assurances that, *if all would pull together and not cut prices*, higher prices could eventually be secured. For instance, there are a number of answers like the following in the early months of the year (supra 27–28):

> If manufacturers will hold steady and not allow wholesalers to stampede them, believe we will have good business in thirty days. (R. 242, 243, supra 27.)
>
> If operators continue to hold firm on prices a few more weeks look for general market to start on upward trend. (R. 281, 283, supra 28.)

The effect of checking price-cutting tendencies among the defendants at that time, through their cooperative activities, may be illustrated by contrasting what was disclosed in the report entitled "Prices of lumber," published in 1919 by the War Industries Board in cooperation with the Forest Service of the Department of Agriculture, concerning conditions in the lumber industry in the winter of 1915:

> With the holding back of expected purchases and with increasing costs of production soon after the opening of the year, lum-

> bermen began to make price concessions in order to move surplus stocks. Psychology plays an important part in the price movement of lumber at such times, and a slight concession in price on the part of a few firms often leads to concessions on the part of all, prices sometimes falling much below the level warranted by the state of the lumber demand (p. 60).

After the first part of the year 1919, when purchasers had abandoned the hope of lower prices for hardwood lumber and were buying at the prices that the defendants had been holding out for, the monthly answers to the questionnaires disseminated among the defendants reciprocal assurances that still higher prices could be secured, culminating, as noted above, in February, 1920, when the defendants had already doubled and trebled their prices. (Supra 16; 44–47.)

Throughout that period the weekly sales reports among the defendants, constantly informing one another of the prices being secured, induced those who did business at a lower cost than high-priced concerns to follow the leadership of the latter in securing high prices, thus eliminating an influence ordinarily tending to hold prices down. This was explained by one of the defendants as follows:

> Your reports of actual sales enable the manufacturer to see what his neighbors are getting for their lumber, and through this course of education, I might say, all those who have access to your reports bring their prices up to the top. (R. 1055; Ex. 1–1120.)

During the same period the discussions of production and prices at the defendants' monthly meetings tended to produce a general enhancement of prices. This is specifically illustrated by the letter from one of the defendants explaining how his attendance at a certain meeting induced him to charge higher prices than he had previously considered *entirely satisfactory*, amounting to an increase of $200 on one order and $7 per M feet on another. (R. 1055; Ex. 1–11; supra 22.) Another defendant made the following significant general statement concerning the meetings:

> We have always left these meetings feeling that we did not get enough money for our lumber and that we ought to try to do better. (R. 1055; Ex. 1–54.)

The efficacy of the "plan" as a whole in enhancing prices is demonstrated by such statements as the following from the defendants themselves:

> We refer to these sales reports continuously and find them of inestimable value. (R. 1055; Ex. 1–1121.)
>
> In many instances (it) has made us one or more dollars per M feet on lumber that we have sold, and we believe that the plan is going to be very successful in carrying out the purposes for which it is intended. (R. 1055; Ex. 1–1139.)
>
> The plan in numerous instances has enabled us to secure more money for our product than we otherwise would have secured without this plan in operation, and we con-

sider this feature probably the most important of the association work. (R. 1055; Ex. 1–1123.)

The very first report which we received under this plan enabled us to increase our price $6 per M on a special item of oak. We had just taken on a small order at what we thought was a satisfactory price, but discovered immediately that others were getting more money, and since that time we have booked orders for a number of these special items at an increase of $6 per M. (R. 1055; Ex. 1–1128.)

The morning he came (the customer) we received the first report of the open-competition plan, giving the market prices as they do now. When this buyer came, we turned to this pamphlet and put $2 per M more than we intended to ask. * * * (R. 1055; Ex. 1–1127.)

By watching reports of others and keeping up on the weekly bulletins, we have been able to close out our dry stock at from $1 to $3 above the general quotations. (R. 1055; Ex. 1–1129.)

The information we get from these reports enables us to market our lumber at better values than we could secure without such information. (R. 1055; Ex. 1–1137.)

By being able to keep posted we feel that we are able to get enough additional money over former prices for our stock that we can afford to cut out wholesaling and personally we think the plan is great. (R. 1055; Ex. 1–1136.)

> We believe that we have profited from $500 to $1,000 in the past thirty days by being informed correctly relative to the price stock is really being sold at. (R. 1055; Ex. 1–1135.)
>
> Relative to the Open Competition Plan, since we have become members, we have been selling our lumber at several dollars per M more than formerly and we are perfectly satisfied with the plan. (R. 1055; Ex. 1–1134.)
>
> Under the old plan of everyone for himself, prices were not so stable, and it took them longer to go up and they came down more quickly. (R. 1055; Ex. 1–1124.)

Those are *direct and explicit admissions* by certain defendants that they were using the "plan" in enhancing their prices, consistently with the declared purpose and as repeatedly urged to do by the manager of statistics; and they justify the conclusion that *the defendants in general enhanced their prices in like manner through the operation of the "plan."*

THE DEFENDANTS' CONTENTION THAT SHORTAGE OF PRODUCTION ENHANCED PRICES.

The defendants' evidence that there was a shortage of lumber, throughout the period covered by the bill of complaint, attributable to abnormal rainfalls, transportation difficulties, and other causes beyond the control of the defendants, does not refute any contention made by the Government.

The Government's contention *concerning curtailment of production* was that the defendants, as a part of their cooperative efforts to secure higher prices, made tentative efforts early in the year 1919

to prevent meeting the shortage of lumber by increasing production; that such efforts were soon abandoned when it became the consensus of opinion that the actual shortage was entirely satisfactory; and that thereafter the defendants devoted a part of their cooperative activities to proving and emphasizing the shortage and urging one another to charge higher prices on that account. (Supra 6, 8, 9.)

The argument that the shortage of production tended to enhance prices does not meet the evidence that the defendants were engaged in a conspiracy to enhance prices by their cooperative activities.

The absurdity, suggested in defendant's brief, of being engaged in a conspiracy to enhance prices when they were being enhanced by natural causes, is not apparent when we consider that *the conspiracy began before the enhancement and that the conspirators were never satisfied with the advances secured but were constantly eager for still higher prices.* (Supra 27–47.)

THE DEFENDANTS' CONTENTION THAT THERE WAS NO UNIFORMITY OF PRICES.

This contention is not responsive to any part of the Government's case, for the Government's evidence showed at the outset that disparity of prices existed among the defendants.

The charge made in the bill of complaint was not that the defendants conspired to fix *uniform* prices, but that they conspired to *maintain and enhance* prices by suppressing competition and substituting in its place cooperation and agreements

having the *purpose and effect* of maintaining and enhancing prices. (R. 21.)

The brief for defendants attempts to meet the position of the Government by the question—

> "How can there be agreements as to prices when everybody is charging different prices?" (br. 42)—

the answer to which is that when different prices are being charged there are obviously no agreements *fixing* prices, but there may well be agreements having the purpose and effect of *enhancing* prices, such as the agreements among the defendants in the present case to carry on the cooperative activities under consideration.

THE DEFENDANTS' CONTENTION THAT THEY ACTED IN GOOD FAITH

The brief for defendants emphasizes the claim that they employed no secrecy in carrying out their plans, that they filed papers with the Federal Trade Commission and Department of Justice, and that they acted upon the advice of counsel.

Of course such considerations have no bearing on any question before this court.

Indulging the assumption that the defendants were advised that a way had been found of accomplishing their purpose without violating the Sherman Antitrust Act, the claim of good faith has received all the consideration to which it could possibly be entitled, in that the proceeding brought by the Government was not punitive in character, but was merely designed to prevent the defendants from further carrying out their purpose of suppressing competition and maintaining and enhancing prices.

THE DEFENDANTS' CONTENTION THAT THEY COMPRISED ONLY 30 PER CENT OF THE PRODUCTION.

The defendants' brief does not succeed in establishing this contention.

The brief relies on the affidavit of a former statistician of the Forest Service of the Department of Agriculture (R. 1728, 1729) and on a chart based on the affidavit and reproduced at page 6, Volume II, of the brief.

This chart shows a heavy black circle representing a total reported production of hardwoods of about five and one-quarter billion feet for the year 1918, from which a segment of slightly less than one-third has been removed as representing a total production of approximately one and one-half billion feet by members of the Open Competition Plan. This chart does not accurately show the proportion of the total production of hardwood lumber dealt in by the members of the "plan" during the period of the alleged conspiracy.

The figures on which the chart is based refer to 1918 rather than 1919, and the membership of the "plan" approximately trebled in 1919 in increasing from 113 companies in January, 1919, to 329 companies in February, 1920. (Defendants' brief, Vol. II, 200.)

Moreover, the chart compares the defendants' production, limited in the main to a group of southern states, including Arkansas, Louisiana, Tennessee, and Mississippi, with the total production of hardwoods for the entire country, including pro-

duction from regions not competing with the defendants.

Again, the chart takes no account of the fact that many defendants were not only producers but wholesalers as well, and as such purchased and controlled large quantities of hardwood lumber produced by concerns which were not members of the "plan."

This may be illustrated by reference to a group of affidavits introduced by the defendants which show that some of them *buy more lumber from others than they produce themselves.* Thus the wholesale business of the Belgrade Lumber Company amounts to about 20 per cent of their total volume of sales. (R. 1651.) James E. Stark & Company produced only 9,000,000 feet in 1919, but bought and resold at wholesale on the open market approximately 15,000,000 feet, including a large volume from mills that were not members of the "plan." (R. 1658.) The North Vernon Lumber Company produced less than 6,000,000 feet in 1919, but bought as a wholesaler for resale approximately 9,000,000 feet. (R. 1676.) The Churchill-Milton Lumber Company produced practically no lumber in 1919, but bought up the production of others and resold the same. (R. 1682.) The president of the Sherrill Hardwood Lumber Company and Sherrill-Russell Lumber Company buys on the open market from producers who are not members of the "plan." (R. 1694.) The Brodhead-Garrett Lumber Company purchases consider-

able more lumber than it manufactures. (R. —.) The Paepke Leicht Lumber Company made large purchases on the open market during 1919 in addition to producing lumber. (R. 1647.)

Some idea of the total proportion of commerce in hardwood lumber carried on by the defendants may be had from affidavits by large *purchasers* of lumber, showing on the whole, that they *purchased more from members of the "plan" than from nonmembers.* Thus a retailer made 60 per cent of his purchases from members and 40 per cent from nonmembers. (R. 1618.) A furniture company scheduled its purchases during 1919, showing a much greater volume and number of purchases from members than from nonmembers. (R. 1620, 1621.) Another retailer made 75 per cent of his purchases from members and 25 per cent from nonmembers. (R. 1703.) A furniture manufacturer bought about 90 per cent of his requirements from members of the "plan" and about 10 per cent from nonmembers. (R. 1707.) A large retailer and wholesaler who was a member of the "plan" but made his purchases indifferently from members and nonmembers, bought 80 per cent of his requirements from members and 20 per cent from nonmembers. (R. 1721.) These instances are selected from affidavits introduced by the defendants and are all the pertinent statements on the subject which we have discovered in the record.

The foregoing is sufficient to show that the chart in question should not be taken as establishing a

control by the defendants of only 28 per cent of the commerce in which they were engaged, and that their percentage of control was greatly in excess of that indicated by the chart.

It was not practicable for the Government to establish precisely what percentage of the total commerce in question was carried on by the defendants, inasmuch as the statistics of the Bureau of Forestry of the Department of Agriculture for the year 1919—the only practicable method of establishing such percentage—have not been compiled up to the present time.

But it was not essential for the Government to establish the precise percentage of the commerce in hardwood lumber carried on by the defendants, it being clear that they carried on an extremely large percentage of that commerce, as already shown. The suit was not brought until the membership of the "plan" had practically trebled within a year, from 113 companies in January, 1919, to 329 companies in February, 1920, and the manager of statistics had declared that at the rate they were going they would soon embrace "*practically every producing interest*," and the efficacy of the "plan" in enhancing prices had been proclaimed, as we have seen, by large numbers of the defendants.

The suit was *preventive* in its character, as is contemplated by the Sherman Antitrust Act, seeking to prevent a further perfection and accomplishment of the purpose of eliminating competition and

maintaining and enhancing prices. It was sufficient that that purpose had already been largely accomplished and was about to be accomplished in still greater degree; and it was *not* necessary for the Government to await the inclusion of all the producing interests, before commencing suit.

ARGUMENT AS TO THE LAW.

A CONSPIRACY HAVING THE PURPOSE AND EFFECT OF SUPPRESSING COMPETITION AND MAINTAINING AND ENHANCING PRICES IS IN UNLAWFUL RESTRAINT OF TRADE.

1.

The Sherman Antitrust Act is a *limitation of rights* prohibiting persons from doing things in concert with one another which they might lawfully do acting separately and as individuals:

> The Sherman law is a *limitation of rights*, rights which may be pushed to evil consequences and therefore restrained. (*Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49.) [Italics ours.]
>
> An act harmless when done by one may become a public wrong when done by *many acting in concert*. (*Eastern States Retail Lumber Ass'n* v. *United States*, 234 U. S. 614.) [Italics ours.]
>
> It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. *The plan may make the parts unlawful.* (*Swift & Co.* v. *United States*, 196 U. S. 396.) [Italics ours.]

2.

The antitrust acts condemn contracts, combinations, and conspiracies suppressing competition and enhancing prices, as being in restraint of trade:

In the *Northern Securities* case, 193 U. S. 197, 337, this court said:

> In all the prior cases in this court the antitrust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that *to destroy or restrict free competition in interstate commerce was to restrain such commerce.*

In *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129, it was said of statutes prohibiting restraint of trade, that—

> *according to them, competition not combination should be the law of trade.*

In the *Standard Oil* case, 221 U. S. 1, 58, the Sherman Act was attributed to—

> the dread of *enhancement of prices* and of other wrongs which it was thought would flow from the *undue limitation on competitive conditions* caused by contracts *or other acts* of individuals or corporations.

In the same case the court declared:

> Contracts *or acts* which it was considered had a monopolistic tendency, especially those which were thought to *unduly diminish competition*, and hence to *enhance prices*—in other

> words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being *in restraint* of trade. (Page 57.)

In *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 87, it was said:

> To preserve from undue restraint the *free action of competition* in interstate commerce was the *purpose* which controlled Congress in enacting this statute, and *the courts should construe the law with a view to effecting the object of its enactment.*

Again, in *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209, it was said:

> *The purpose of such statutes (anti-trust laws) is to secure competition and preclude combinations which tend to defeat it.*

And recently, in *Thomsen* v. *Cayser*, 243 U. S. 66, 86, this court vigorously *repudiated* the contention that—

> it was the clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers—

which contention counsel for the defendants in that case sought to base on the use of the word "undue" in the *Standard Oil* case—as if the plan was not rendered undue or unreasonable by having the purpose of doing the very things which the law sought to prevent!

In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, the court condemned an agreement among competitors (doing 30 per cent of the country's business in iron pipe) that their joint representative should make single bids for all and that jobs thus secured should be allotted in each case to the one offering the largest bonus for division. The court held that the agreement restrained trade *by tending to enhance prices*, saying—

> * * * it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination * * *
>
> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. * * *
>
> If iron pipe cost one hundred dollars a ton instead of the prices which the record shows were paid for it, no one, we think, would contend that the trade in it would amount to

> as much as if the lower prices prevailed. *The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article.* (*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 240, 244, 245.)

If there is need of evidence to sustain the application to the present case of the principle thus recognized that high prices tend to restrain trade by reducing its volume, the following may be noted:

On June 1, 1919, defendant, James E. Stark Co., declared: "The tendency to increase prices has checked orders." (R. 423.)

On October 1, 1919, defendant, Lee Wilson Co., declared: "Prices are so high concerns are not buying." (R. 746.)

At the meeting of November 14, 1919, at Memphis, at which 80 persons were present, the minutes show that there was a discussion of the probability of high lumber prices driving box manufacturers to use substitutes, and also that a member spoke about—

> the probability of the high prices of hardwood flooring diverting the flooring business from wood to tile; it was also brought out that the built-up panel people were substituting western woods for southern hardwoods. (R. 196.)

On January 1, 1920, defendant Kraetzer-Cured Co. declared:

> Believe caution should be exercised not to force consumers to seek substitutes. (R. 929.)

On January 1, 1920, defendant "Manager of statistics" declared:

> There is some apprehension of danger in the present high price levels, and its probable result in discouraging building operations and turning the attention of some lines of trade to wood substitutes. (R. 971.)

The foregoing shows that defendants recognized that high prices were diminishing trade and commerce in hardwood lumber, to the ultimate detriment of the industry; but nevertheless the defendants did not abandon the plan they had adopted for enhancing their prices.

3.

A conspiracy in restraint of trade is condemned *as such* by the Sherman Act, and not only where means are employed which would be unlawful standing by themselves apart from the conspiracy.

New and ingenious means have constantly been devised to accomplish the suppression of competition and enhancement of prices which it was the purpose of the Sherman Act to prevent; but, in each case where it was established that the *purpose* and *effect* of the combination was contrary to the purpose of the act, it was held that the condemnation of the act applied, even though the means employed were not in themselves unlawful acts.

Take, for example, the cases where the means consisted in organizing a corporation which either bought out or secured control over previously inde-

pendent and competing companies so as to operate them without competition, as a unit.

Northern Securities Case, 193 U. S. 197;
U. S. v. *Union Pacific R. R. Co.*, 226 U. S. 61;
U. S. v. *International Harvester Co.*, 214 Fed. 987.

Again, the cases where the means consisted in appointing a price-fixing committee, or corporation, to act for companies otherwise independent.

Continental Wall Paper Co. v. *Voight*, 212 U. S. 227;
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20.

Again, the case previously noted where the means consisted in an agreement between companies otherwise independent which fixed no definite price but provided for a system of joint bidding tending to enhance prices.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211.

Again, the cases where the means consisted in the *exchange of information* amongst members of a trade association.

Eastern States Retail Lumber Ass'n v. *United States*, 234 U. S. 600;
United States v. *Hollis*, 246 Fed. 611.

In all those cases, cited merely for illustration, the condemnation of the court was based on the combination or conspiracy having the *purpose* and *effect* of suppressing competition or enhancing prices—*not on*

the particular means employed for attaining those results.

Thus the cases illustrate the principle laid down by this court in the *Tobacco Case* that the statute was so framed as to prohibit combinations and conspiracies to accomplish a restraint of trade *by any means whatsoever*, that it—

> embraced *every conceivable act* which could possibly come within the spirit or purpose of the prohibitions of the law without regard to the garb in which such acts were clothed.

and that—

> in view of the general language of the statute and the public policy which it manifested, there was *no possibility of frustrating that policy* by resorting to any disguise or subterfuge of form. (221 U. S. 181.)

4.

In the two lumber cases last previously mentioned the courts held that a conspiracy accomplishing a restraint of trade *by means of interchange of information* was obnoxious.

In the first of those cases, the *Eastern States Retail Lumber Association Case* (supra 79), one of the purposes of the association was to prevent wholesale lumber dealers from selling at retail to consumers—to confine trade to so-called "regular channels." With that purpose the members of the association, through their secretary, distributed so-called "Official reports," consisting in an exchange of informa-

tion as to the names of wholesalers who sold at retail to consumers, without any agreement whatsoever as to the use to be made of the information. The special court of four circuit judges condemned the combination exchanging the information because of the tendency to restrain trade in confining it to "regular channels," saying:

> *May the several retail dealers combine into an association, in order the better to acquire and distribute knowledge about the business methods of others, by means of the circulation among themselves of reports such as these?* It seems to us that they cannot do so without violating the Sherman Act. It is now well settled that the words "restraint of trade" in that act are to be construed as including restraint of competition. Full, free, and untrammeled competition in all branches of interstate commerce is the desideratum to be secured. * * * *The circulation of this circular certainly tends to restrain directly some wholesalers from entering into competition with retailers.* This seems to be contrary to the statute as the Supreme Court has construed it. That the defendants and their members are in a combination to prepare such circulars and to distribute them is manifest. We conclude that the Government is entitled to an injunction against the further circulation of these "Official reports." (201 Fed. 583, 584.)

This court affirmed the decree against the further circulation of the "Official reports" in *Eastern States*

Retail Lumber Dealers Ass'n v. *United States*, 234 U. S. 600, saying:

> True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty administered for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report * * *.
>
> The conspiracy to accomplish that which was the natural consequence of such action may be readily inferred. (234 U. S. 609, 612.)

That case was followed in *United States* v. *Hollis et al.*, 246 Fed. 611. Hollis was the secretary of the Northwestern Lumbermen's Association. As in the former case one of the purposes of the association was to confine the lumber trade to "regular channels." The method employed in attaining that purpose consisted in the distribution, through the secretary of the association, of information as to "irregular" sales by manufacturers, coupled with sedulous protestations that this was a mere *exchange of information* and that there was no agreement for any action to be based thereon, such as the following:

> The sole purpose and object of this association shall be to keep its members constantly informed of those manufacturers and wholesalers who may persist in selling at retail in competition directly or indirectly with any member of this association, to the end that members hereof may refrain from dealing with such manufacturers and whole-

salers and their agents, if they or any of them so elect or desire.

* * * * *

No rules, regulations, or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

* * * * *

No promises or agreements of any kind shall be requisite to membership in this association, nor shall any penalties be imposed upon its members for any cause whatsoever. (246 Fed. 615.)

The District Court pointed out that the distribution of information as to "irregular sales," referred to under the name of "Customers' lists," was in restraint of trade in that it tended to confine trade to "regular channels," thus:

> Defendants were successful to a very considerable degree in restraining such interstate commerce as was considered unethical or irregular, and in restricting interstate commerce to so-called regular channels; that is, from wholesalers and manufacturers to the retailer and from the retailer to the consumer. (246 Fed. 623.)

The District Court thereupon ordered an injunction against the further distribution of the information in question, or, more specifically, against—

> The use of customers' lists in collecting, compiling, and distributing information, whether to the members of the association, to trade

> publications, or other newspapers, to credit agencies or to the public at large, as to sales by wholesalers and manufacturers direct to consumers, including mail-order houses and cooperative yards. (246 Fed. 624.)

The former lumber cases cannot be effectively distinguished from the present case on the ground that they involved *boycotts*, while the present case does not. In each of the cases the exchange of information was enjoined for the reason that it was a means of accomplishing a conspiracy to restrain trade—by confining trade to "regular channels" in the former cases, and by enhancing prices and thus reducing the volume of trade in the present case. *The presence or absence of a boycott was not the essential circumstance because the illegality consisted in the conspiracy in restraint of trade, and a boycott was subject to condemnation under the Sherman Anti-Trust Act only in so far as it constituted such a conspiracy.*

5.

The defendants' brief does not directly deny that a conspiracy having the purpose and effect of suppressing competition and maintaining and enhancing prices is unlawful even though the means of accomplishing it might be lawful acts apart from the conspiracy. It seeks *indirectly* to avoid the application of that principle by likening the present case to (*a*) cases where the courts have sustained *rules* and *regulations* of business which incidentally affected

interstate commerce, and (*b*) cases where the exchange of trade statistics among the members of an association was not condemned.

There was no proof in those cases of any purpose and effect to suppress competition and maintain and enhance prices.

Take, for instance, *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, relied on in defendants' brief. It involved the validity of a rule of the Chicago Board of Trade fixing the prices at which members should purchase grain between the closing of the exchange on one day and the opening on the next day. In sustaining the rule this court said:

> The case was rested upon the *bald proposition* that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the antitrust law (p. 238). [Italics ours.]

The present case rests on no such theoretical proposition, but on a *mass of evidence* that the defendants conspired with the purpose and effect of suppressing competition and maintaining and enhancing prices, during all business hours, throughout a period of thirteen months.

Again, the defendants' brief relies on the earlier case of *Hopkins* v. *United States*, 171 U. S. 578, where this court sustained a rule of an association of commission merchants engaged in buying and selling live stock at Kansas City, fixing the *commission*

charges of the members for buying and selling. The court held that the agreement *did not affect* interstate commerce, saying:

> The services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such services is not therefore a combination in restraint of that trade or commerce (pp. 590–591).

And, again:

> It does not appear that the defendants are engaged in interstate commerce or that any agreements or contracts made by them and relating to the conduct of their business are in restraint of any such commerce (p. 603).

The distinction between the regulation in the *Hopkins* case fixing *commission charges* for services rendered by persons *not engaged in interstate commerce* and the conspiracy in the present case to enhance the *selling prices* of persons *engaged in such commerce* is too obvious to require elaboration.

Again, the defendants' brief refers to *Anderson* v. *United States*, 171 U. S. 604. In that case an agreement among associated stockyard traders not to buy from persons who sold to nonmember traders was contended to be unlawful *on its face*. There was *no proof* of any purpose or effect of restraining interstate commerce. In sustaining the agreement this court declared that an agreement was not obnoxious—

> where the undisputed facts clearly show that the *purpose* of the agreement was not to regulate, obstruct, or restrain that commerce—

and where—

> the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental and *not its purpose or object.* (171 U. S. 615, 616.)

That, again, was a case which rested upon a "bald proposition" without any proof, such as abounds in the present case, of a purpose to suppress competition and maintain and enhance prices.

The defendants' brief also refers to *United States* v. *Reading Company,* 183 Fed. 427, where, in the course of a long and highly complicated litigation, some evidence was produced with reference to a bureau of anthracite-coal statistics to which many anthracite producers made monthly reports of their tonnage, sales, and prices at New York Harbor, which were then compiled and distributed by the secretary. In deciding the case the District Court made a passing and obscure reference to the operations of the bureau without condemning it (p. 442), which is emphasized in the brief for defendants, but hardly requires further comment from us.

Defendants' brief also relies on *United States* v. *M. Piowaty & Sons,* 251 Fed. 375, where the district court sustained a demurrer to an indictment charging that the defendants unlawfully conspired in restraint of trade in that they caused onions to be bought by members of their association in accord-

ance with a concerted plan. The court held that *agreement was not adequately alleged.* It held that the unlawful agreement might be tacit as well as express, and its existence might be inferred from the conduct of the parties, but that if such was the theory of the prosecution it should be made clear in the indictment. There is nothing in that inconsistent with the position of the Government in the present case, which has been made clear throughout, that the defendants agreed with one another in carrying on their cooperative activities with the purpose and effect of suppressing competition and enhancing prices.

Defendants' brief also refers to the charge of District Judge Grubb to the jury upon the trial of the indictment in *United States* v. *Aileen Coal Company et al.* in the southern district of New York, against members of an association of producers of bituminous coal, alleging a combination to enhance prices by agreement. One item of evidence in support of that allegation was that members exchanged information regarding sales and prices. In commenting on that evidence the district judge, in a passage quoted in the present defendants' brief, referred to the right of persons engaged in business to share information and to accompany this with statements as to what they expected to obtain for their products.

Of course there is no question but that such right exists, and may be exercised, excepting where curtailed by statute. It is our position that the exercise

of such right pursuant to a conspiracy to suppress competition and maintain and enhance prices is curtailed by the Sherman Antitrust Act. The district judge in the Aileen Coal Company case does not seem to have been squarely confronted with that proposition.

Again, defendants' brief refers to the case of *State* v. *Arkansas Lumber Company*, 360 Mo. 212, 169 Southwestern 145, 177, where the court in condemning the activities of the Yellow Pine Association undertook to declare that *if* the secretary had limited himself to obtaining reports from correspondents of actual sales and fairly compiling and averaging such reports the court would not say that his acts were unlawful. It is sufficient to note that the court was there speaking *hypothetically* of a condition with which it was not confronted.

Defendants' brief also quotes from an opinion to the Yellow Pine Manufacturers' Association, dated April 8, 1909, by former Solicitor General Lehmann, wherein he advised the association that it had the right to collect and distribute information as to production, stocks on hand, and prices asked and received, and that each person receiving such information had the right to act upon it as he thought proper. The former Solicitor General obviously assumed that the information would not be exchanged pursuant to a conspiracy to suppress competition and enhance prices, violative of the Sherman Act.

The foregoing review of authorities relied on in defendants' brief shows that no case has been produced

holding that a conspiracy having the *purpose and effect* of suppressing competition and maintaining and enhancing prices is free from condemnation because it employs as a means of attaining its purpose the exchange of information among the parties to the conspiracy, or because of any other reason.

ARGUMENT AS TO THE COURT'S EXERCISE OF DISCRETION.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN FRAMING THE TERMS OF THE INJUNCTION.

Subdivision (b) of the decree ordered the defendants—

> not to take any further steps whatsoever in compiling, printing or distributing through the said F. R. Gadd, "Manager of statistics," or otherwise, at Memphis, in this district, or elsewhere, the next issues of the monthly "stock reports," monthly "production reports," and weekly "sales reports" of the said so-called "open competition plan," or any other issues of any such or similar reports.

Subdivision (c) ordered the defendants—

> not to discuss prices which have been charged or are to be charged by the defendants or by any other persons for hardwood lumber *at any of the coming association meetings of the defendants.* [Italics ours.]

Subdivision (d) ordered the defendants—

> not to exchange through the said F. R. Gadd, "Manager of Statistics," or otherwise, written predictions to the effect that high prices for hardwood lumber will continue to be maintained and enhanced. (R. 1761.)

The brief for defendants contends that inasmuch as the practices thus enjoined *might* be lawful in themselves standing apart from the conspiracy, the decree should have been so qualified as to enjoin their continuance only when carried on *for the purpose of*, or *as a means of*, carrying out the alleged conspiracy, or a similar conspiracy.

The insertion of such a qualification would seriously impair the efficacy of the decree by reducing it in substance to a mere restatement of the elementary principle of law which forbids all persons to carry out a conspiracy having an unlawful purpose and effect by means which are lawful acts standing by themselves, thus leaving matters just where they were before the suit was begun.

If the decree were thus qualified and the defendants should thereupon resume their discussions of prices, their exchange of price reports, and their exchange of predictions that prices would continue high, it would be necessary, in order to show that this constituted a violation of the decree, to establish what their *purpose* was in so doing; in other words, to again litigate a disputed question involving a multitude of considerations.

The suggestion that the unqualified decree may prevent the defendants from exercising a lawful right for a lawful purpose is highly improbable. The evidence in this case shows that defendants have always carried on the enjoined practices concertedly with the purpose of suppressing competition and maintaining and enhancing prices. It is in-

herently improbable that they would resume such practices in any other manner or for any other purpose. Thus, there is no real danger that the defendants will be prevented from doing any lawful act for a lawful purpose by the decree standing as it is, unqualified.

The question being one of the proper exercise of discretion by the court in order to produce a decree which may be efficacious in compelling observance of the law, it is proper to give more weight to the practical consideration that the proposed qualification would render the decree nugatory, than to the theoretical argument that the defendants *might* thereby be deprived of the exercise of a lawful right for a lawful purpose.

To qualify the decree as proposed by the defendants would be contrary to the course followed in *Eastern States Retail Lumber Dealers' Association* v. *United States* (supra 80). Examination of the decree of the special court of four Circuit Judges in that case shows that it prohibited the defendants *absolutely and without qualification* from exchanging a certain kind of information. This court, in affirming the decree, noted that it enjoined the defendants—

> from distributing to members of the associations named or any other person or persons any information showing soliciting quotations or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber and from the preparation and distribution of the lists

above described as the "official report," or the use of a similar device. (234 U. S. 606.)

Similarly, in *United States* v. *National Wholesale Jewelers' Association*, an equity case under the Sherman Act in the Southern District of New York, the decree of District Judge Hunt, dated January 30, 1914, prohibited the defendants *absolutely and without qualification* from publishing or distributing lists of manufacturers whose policy was to confine sales of jewelry to persons engaged in the wholesale and jobbing jewelry business.

Again, in *United States* v. *Hollis* (supra 82), the final decree of District Judge Booth, dated August 10, 1917, prohibited the defendants *absolutely and without qualification* from publishing or distributing the names of manufacturers or wholesale dealers whose policy was to confine sales of lumber to persons engaged in the business of retail dealing in lumber.

Thus, the cases show that where the exchange of information was habitually conducted with the purpose of carrying out an unlawful conspiracy to restrain trade by confining it to "legitimate" channels, the further exchange of such information was enjoined absolutely and without qualification.

So, too, in the present case, where the defendants habitually exchanged information with the purpose of carrying out a conspiracy to restrain trade by suppressing competition and maintaining and enhancing prices, they should be enjoined absolutely and without qualification from further exchanging such information.

In support of the contention that the decree should be qualified, the defendants' brief refers to *United States* v. *Swift*, 196 U. S. 375, where this court before affirming an injunction against obtaining rebates considered the question whether the act enjoined was in and of itself unlawful and decided that it was. (196 U. S. 402.) The *Swift case* is not a direct authority on the question here under consideration and the argument in defendants' brief is based solely on the manner in which the court reasoned in that case. Such an argument is, of course, of less weight than the later and direct authority of *Eastern States Lumber Association* v. *United States* and other cases which we have relied on above.

In like manner it may be summarily stated that the other cases cited in defendants' brief—

United States v. *Corn Products Co.*, 234 Fed. 964;

Wilder Mfg. Co. v. *Corn Products Refining Co.*, 236 U. S. 165;

United States v. *Patten*, 226 U. S. 525;

United States v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87—

furnish no direct authority on the question under consideration.

For the reasons noted above, the exercise of the discretion of the trial court in framing the injunctive provisions of the decree without qualification should not be disturbed.

The remaining point raised by the assignment of errors in criticism of the decree, that subdivisions (c),

(d), (e), (f), and (g) are so vague as not to inform the defendants with reasonable certainty of what they are required to do, is not argued in defendants' brief and will not be argued by us.

A mere inspection of the provisions in question, three of which are quoted above and all of which are found at R. 1761, will show that they are highly specific and definite and in no respects open to the criticism of vagueness.

III.

CONCLUSION.

We submit that the decree of the court below should be affirmed in all respects.

WILLIAM L. FRIERSON,
Solicitor General.

HENRY S. MITCHELL,
Acting Assistant to the Attorney General.

OCTOBER, 1920.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. [redacted]71

AMERICAN COLUMN AND LUMBER COMPANY AND OTHERS, APPELLANTS,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

APPLICATION FOR STAY OF PART OF INJUNCTION.

L. C. BOYLE,
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GREGORY & TODD,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 369.

AMERICAN COLUMN & LUMBER CO. ET AL.,
APPELLANTS,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

APPELLANTS' REPLY BRIEF.

There are several matters to which we desire to refer briefly by way of reply.

1. In the court below the Government stressed the charge that the defendants enhanced prices by intentionally curtailing production, and the District Judge was persuaded to adopt that theory. Indeed he makes it the primary ground of his decision, saying, after a review of all the evidence:

> "It is difficult, if not impossible, on this record, to escape the conclusion that the purpose and intention of the Plan was to suppress competition among its

> members and create and perpetuate a condition in the hardwood lumber manufacturing business wherein the *production of hardwood lumber was to be kept low enough to maintain prices on an ascending scale,* * * *" (3 Rec., 1739-1740.) [Italics ours.]

Confronted with a solid wall of testimony to the contrary of this, the Government has changed its position, and now says that its "contention concerning curtailment of production" is that the defendants made "tentative" efforts to that end "early in the year 1919," and it concedes that even these "tentative" efforts "were soon abandoned" [1] (Gov't Brief, pp. 66-67).

The theory that the defendants enhanced prices by curtailing production, which the Government pressed upon the District Court, and upon which, largely, that court gave judgment in its favor, has thus been abandoned.

2. The brief of the Government asserts that the defendants gave "assurances" "that prices would be maintained and enhanced." (P. 27.)

In support of this assertion the brief then devotes twenty pages to quotations from the minutes of the monthly meetings and from the answers to the monthly questionnaires. (Pp. 27-47.)

This assertion goes to the very heart of the case, since, of course, if the defendants gave assurances to each other that they would enhance prices, they were parties to an agreement

[1] The entire paragraph from which these quotations are taken is as follows:

"The Government's contention concerning curtailment of production was that the defendants, as a part of their co-operative efforts to secure higher prices, made tentative efforts early in the year 1919 to prevent meeting the shortage of lumber by increasing production; that such efforts were soon abandoned when it became the consensus of opinion that the actual shortage was entirely satisfactory; and that thereafter the defendants devoted a part of their co-operative activities to proving and emphasizing the shortage and urging one another to charge higher prices on that account" (Gov't Brief, pp. 66-67).

to enhance prices, and no one disputes the illegality of such an agreement.

The statements which the Government quotes and characterizes as "assurances" by the defendants that they would maintain or enhance prices are, however, nothing of the kind.

They were[2] simply expressions of opinion that in view of the conditions of supply and demand the trend of prices would be upward.

This was the truth, and the defendants could not have said less if men engaged in the same industry are to be conceded any right at all to exchange opinions on market conditions.

3. The Government makes no effort to establish the illegality of the practice of the defendants in interchanging information as to stocks on hand, past sales and prices and rate of production. Indeed, it appears now to concede its legality (though refusing to do so in the lower court), but says that even though the practice itself be lawful, nevertheless, since the defendants habitually and wilfully engaged in it for an unlawful purpose, it was right to prohibit them from engaging in it at all. (Pp. 91, 93.)

In other words, that, though there be no law against the practice, and though it be open to everybody else in the lumber industry and in every other industry to engage in it, these particular defendants can never again engage in it, because, as the Government charges, they once made wrongful use of it.

We have already given our answer to that proposition as a matter of law. (Appellants' Main Brief, pp. 50-77.) It remains to add that the premise on which the proposition rests, namely, that the defendants have been wilful and habitual

[2]Excepting such statements as the following, "Look for good business at present prices, providing lumbermen do not get uneasy and put prices," made by two or three individual members out of hundreds.

violators of the law, is without foundation; and in that behalf we call as witness the District Judge, who stated:

> "I do not doubt that some of the defendants, if not all of them, were advised that the Plan was lawful and that their participation in its operation was lawful, but their conduct must be here considered in the light of results". (3 Rec., p. 1740.)

4. To the proposition that it has not been shown that the alleged combination had the power to bring about the enhancement of prices charged against it, and that in order to sustain a charge of combining to control or enhance prices it is essential as a matter of law to show that the combination has the power to do those things, the Government makes no answer except to say that "it was not practicable for the Government to establish precisely what percentage of the total commerce in question was carried on by the defendants" (Gov't Brief, p. 72).

It is not insisted, of course, that the Government must establish the precise percentage of the commerce in question carried on by the defendants, but it was an essential part of its case to show in some way that the defendants have the power to accomplish what they are charged with conspiring to do. (Appellants' Main Brief, pp. 48-50.)

5. The Government gives prominence in its brief to the fact that for a short time a group of members in Memphis held weekly meetings at which were read lists of *high prices* of members of the "Open Competition Plan" as reported to the Manager of Statistics. This procedure was abandoned in July, 1919, within two weeks after its commencement.

These facts were brought out by counsel for the defendants themselves in pursuance of the policy of laying bare everything connected with the Association. So far from tending to establish that the "Open Competition Plan" is a cover for illegal agreements they rather show that the membership of

the Plan as a whole was alert to see that its machinery was not put to any use which might be called in question.

6. The Government has taken words, phrases, sentences, and paragraphs from speeches, letters and articles, and placed them before the court detached from their environment.

What the Lord Chancellor in the *Mogul S. S. Co. Case*, L. R. App. Cas. 1892, pp. 25, 36, referred to as "phrases in the evidence taken by themselves," are not safe grounds for conclusions.

For the purpose of indicating the method employed by the Government, we cite the following illustrative items:

At page 6 of the Government's brief, there appears a statement by a member at the group meeting held at Cincinnati, January 21, 1919, as follows:

> "If there is no increase in production, particularly in oak, there is going to be good business,"

and

> "No man is safe in increasing his production."

The quotations were to indicate, doubtless, that there was some kind of combination to curtail production, and that the language quoted was an expression of inducement to that end.

Now, the matters quoted are the opening and closing portions of a statement made by Mr. Robinson. It is of interest to note just what Mr. Robinson did say:

> "Consuming plants in this country have heavy stocks. The Government had a surplus of lumber to move. That he believed hardwoods were in better shape than softwoods, although the softwood people say to the contrary. That export demand would come in time, but we can't wait a year or two for it to come. If there is no increase in production, particularly in oak, there is going to be good business,

but did not believe sawmill men would make much money this year. Nothing in sight to make sawmill men get busy. Lots of firms are going to have hard sledding. If we commence to have business failures, we are going to have hard times. Believe hardwood industry has brightest future of any industry, but do not think any industry has much to look forward to. The cost of living must first be adjusted. Cost of production is near selling price. Oak has gone up less than almost anything else. Believe #2 common and better oak will go higher—it will have to to let us live. First and second oak sold for $60.00 in 1914—now selling for $70.00. That is not much advance. The same condition exists in #1 common. The lower grades went up, and if they had not, our cost would have exceeded our selling price. I do not believe the lower grades will hold up, and that is where we have been making our money. I think there will be a good volume of building, but no man is safe in increasing his production. If he does, he will be in bad shape, as the demand won't come".

If we recall conditions as they confronted men in every line of business in January, 1919, is it possible to read an evil intent into the above? Moreover, there were but ten members at the meeting where this statement was made, and, as already explained, statements made at group meetings are not distributed; hence only ten out of the entire membership of the Association knew what Mr. Robinson said.

We now turn to the treatment accorded the market letters. On pages 7 and 8 of the Government's brief the market letter of May 17 is reviewed. This market letter carried a quotation from the "Southern Lumberman," in which the suggestion was made that night runs "would kill the goose that lays the golden eggs," etc. We have already referred to this letter in our main brief. (P. 46.) The point is that in the Government's brief, page 8, immediately following the review of the market letter of May 17, containing the quotation from the "Southern Lumberman," there is quoted

a statement made by Mr. Patterson at a group meeting held at Shreveport on May 21, as follows:

> "That in his opinion it was suicide to run mills night and day. The pine mills had done it but he hoped they would profit by their experience and not do it this year."

Naturally, one not intimately familiar with the record would get the impression that Patterson's statement was due to the fact that he had read Mr. Gadd's letter of May 17 and was acting in accordance with it, whereas the truth is that this letter did not leave Mr. Gadd's office until May 22—this due to the length of time essential to prepare the sales report before it is distributed (the letter went with the report) and the time necessary for it to reach the members after it is mailed.

Turning to the manner of referring to letters written by the members to Mr. Gadd. One would get the impression from the Government's brief that there was a constant flow of letters passing between the members and Mr. Gadd as to the value of the plan, whereas the fact is the letters were all written on one occasion, as set forth in our main brief.

The Government has selected excerpts from a few of these letters. We have ~~assembled~~ abstracted the letters in Part II of our brief, page ~~1055~~ 1056, and ask the court to read them in their entirety and in connection with the testimony of the men who wrote them.

To illustrate the need of doing this if a true understanding of these letters is to be had, we call attention to the following quotation from one of the letters in the Government's brief, page 18:

> "The very first report which we received under this plan enabled us to increase our price $6.00 per thousand o... a special item in oak. We had just taken on a small order at what we thought was a satisfactory price, but discovered immediately that others were getting more money and since that time we have

> booked orders for a number of these special items at an increase of $6.00 per thousand."

This letter was written by the defendant J. M. Morgan, who has a hardwood mill at Wylesville, La. His operation is small; he has no sales organization and sells his product at the mill door to wholesalers. His letter should be read in connection with his testimony, as follows:

> "Maintains no sales organization and markets his product largely to wholesalers, possibly *85 per cent* of his product being so sold. For this reason, the sales reports of the Open Competition Plan were of especial value for the reason that the *wholesalers* from the nature of their business are constantly in touch with the market, and when purchasing naturally desire to *buy* at as *low a figure* as possible. These sales reports were a *check* against their statements. By virtue of these reports, he was enabled to get nearer the market price from the wholesalers.
>
> "He absolutely controls his own sales policy and his own price policy in reference to the production of his plant.
>
> "Before the introduction of the Open Competition Plan, certain unscrupulous middlemen made a practice of misrepresenting the prices at which they had purchased lumber from neighboring producers, and thereby *forced the small producer* to make an abnormally low price. This practice has been done away with by the Open Competition Plan. In the opinion of witness this is one of the chief benefits derived from the Open Competition Plan, especially as to the smaller producers, who are not in touch with the market" (3 Rec., 1691-1692). [Italics ours.]

Without further enumerating instances, we think enough has been stated to show that the Government's method of exposition is not calculated to give a true view of the record.

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October, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

AMERICAN COLUMN & LUMBER COMPANY et al., appellants,
v.
THE UNITED STATES OF AMERICA. } No. 71.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

[All italics are of the authors of the brief unless otherwise stated.]

A number of exhibits have not the print pages, and when referred to will be cited as original pages.

HISTORY AND PRACTICES OF APPELLANTS IN CONNECTION WITH THE AMERICAN HARDWOOD MANUFACTURERS' ASSOCIATION.

ORGANIZATION OF THE ASSOCIATION.

The present American Hardwood Manufacturers' Association was organized on January 1, 1919. In 1917 an association having the same name was organized with headquarters in Memphis, Tenn., and in 1902 an association bearing the name of the Hardwood Manufacturers' Association of the United States was organized with headquarters in Cincin-

nati, and the present association was formed by consolidating those two. (Answer, R. Vol. I, pp. 45–46.)

CONSTITUTION AND BY-LAWS.

The present association appears to have continued operation under the constitution and by-laws of the former Hardwood Manufacturers' Association. There is, of course, nothing specially significant in either the constitution or the by-laws. The objects of the association are declared to be "to adopt such measures as will provide for uniform standards and improved methods of manufacturing and marketing hardwood forest products; to acquire, preserve, and disseminate information in connection therewith; and to generally promote the interests and welfare of hardwood manufacturers." (R., Vol. I, p. 70.) But it is declared that "none of said purposes shall be deemed or construed to include any suggestion that products be sold other than in open and honest competition with other manufacturers thereof, or that any market report, price current, or price list to be published by this association or in its behalf shall in any manner affect the cost of products other than a statement of the actual sales of same, or that control of the amount of production of products be in any way affected or attempted; and all such purposes being hereby expressly disclaimed." (R., Vol. I, p. 71.) Apparently it was expected that something would be done which might be construed as intended to accomplish the purposes here denied.

It was contemplated that a large sum of money would be needed to prosecute the activities of the association. The initiation fee was $25 and the annual minimum dues were $50, but the dues were to be assessed on a production basis for the previous year, the maximum dues being as follows:

Manufacturers of hardwood lumber: Five cents per thousand feet, not to exceed $2,000 for the general work, and 10 cents per thousand feet for a special department, if organized.

Manufacturers of sawn and sliced veneers: Fifteen cents per thousand feet for general work, and 30 cents for the special department.

Manufacturers of commercial rotary veneer: Five cents for general work and 10 cents for the special department.

Manufacturers of other hardwood products: At rates to be fixed by the board of directors. (R. Vol. I, pp. 72–73.)

Some idea as to the possibilities of these assessments may be obtained from an examination of the production report for 1919. (R. Vol. I, orig. pp. 221–229.) The production for the month of November appears to have been 105,948,000 feet, which, if assessed at only 5 cents per thousand for all purposes, would produce $5,287.40, or $63,448.80 per annum.

The constitution also contained the usual provisions with reference to meetings and officers, and provided for a secretary-manager to be appointed at a salary fixed by the board of directors, and that he

be subject to the direction of the board of directors. (R. Vol. I, p. 75.) One of the committees provided for was a "committee on reports and statistics," and its duties were "to work out plans for the securing and tabulating of such information and statistics as will be of interest and value to the membership, and to determine on the form in which such information shall be given to the members, with power to have audited the records of the members on which their reports are based." (R. Vol. I, p. 78.)

PLAN OF OPERATION.

On January 29, 1917, a plan of operation was adopted by the board of governors, which plan should be carefully considered.

As the introduction to this plan states what it was claimed the association would accomplish, it is quoted in full, as follows:

> The purpose of this plan is to disseminate among members accurate knowledge of production and market conditions so that each member may gauge the market intelligently instead of guessing at it; to make competition open and above board instead of secret and concealed; to substitute, in estimating market conditions, frank and full statements of our competitors for the frequently misleading and colored statements of the buyer.
>
> This plan does not contemplate doing anything illegal or anything which might be developed into illegal acts. There is absolutely no agreement as to prices, either real or implied. There is no obligation, either real or

implied, on the part of any member to charge any other price than what he himself thinks best. There is no obligation, either real or implied, on the part of any member to reduce, increase, or change the character of his production in any other manner than he himself may think best. The plan will, however, furnish information to enable each member to intelligently make prices and intelligently govern his own production.

It is illegal to fix prices by agreement and it is illegal to control production by agreement. It is not, and we are informed never can be, illegal for members to tell each other what they have done, what prices they have received, what prices they have quoted, and what they produced. By making clear what we propose to do and what we propose not to do, we feel that we have placed ourselves upon firm ground so far as the legality of our plan is concerned.

The advantage of this plan as a matter of public policy must be self-evident. The advantage of a stable market to both the buyer and the seller is well known. A large part of the time wasted in arguing over prices and the various maneuvering on the part of both buyer and seller, one trying to reduce the price and the other trying to raise the price, wastes time and energy and results in a great variety of prices for the same kind and quality of lumber.

The chief concern of the buyer, as we all know, is to see that the price he pays is no higher than that of his competitors, against whom he must sell his product in the market.

The chief concern of the seller is to get as much as anybody else for his lumber; in other words, to get what is termed the top of the market for the quality he offers. By making prices known to each other they will gradually tend toward a standard in harmony with market conditions, a situation advantageous to both buyer and seller. The committee does not expect this plan to result in one price for any one grade, and the difference between even the same grades of various manufacturers is well recognized. It is contended, however, that in a very short time the extreme range of prices on any one grade will be materially reduced and eventually the prices obtained will be in direct relation to the character of the grade offered and the prevailing market conditions. This is all any of us can hope for.

It is impossible to go into all the phases of the open price proposition in this report, but it is expected by the committee that this will be sufficient to answer the present purposes and that further detailed explanation and discussion can best be reserved for a meeting at which this plan will be inaugurated, where opportunity will be afforded for explanation of all points that are not entirely clear.

The open competition plan has been in operation in various industries with signal success. Manufacturers have learned that by helping their competitors they help themselves. They have learned that the low-priced competitor makes the market and that the low-priced competitor does not make such prices because he wants to be low priced, but because of either lack of infor-

mation as to market conditions or because of an inferior product. Open competition gives the competitor that information which he has lacked and his desire to get the most possible for his product can be safely relied upon as sufficient incentive for him to get the market price. If his low prices are due to an inferior product or poor service to his customers, he will find it out when he tries to discover why his prices are not in line with his competitor's and through the general discussions at the regular meetings.

There is more than one case on record where a large concern has at its own expense employed experts to put in cost systems for competitors and to show competitors how to bring their products up to a high standard. They did it from no philanthropic motives, but because they knew that a poor competitor weakens the market and thereby reduces the prices at which they must sell their products.

Although a discussion of this subject could continue indefinitely, we will conclude by pointing out that all the fundamental principles of this plan are recognized as sound among leaders of thought and action in this country and that organization is no longer to be considered as a luxury, or as something to be considered after all trivial details of one's own business are disposed of, but as a necessity; an integral part of our business if we expect to progress with the world instead of being crushed out by better methods and better organizations, both at home and abroad. High Government officials are urging and pleading with the business men of the country for organized effort.

> The committee respectfully submits this plan in the belief and hope that it will serve as a starting point for a sure and irresistible progress onward toward better things. (R., Vol. I, pp. 79–81.)

The provisions of the plan are substantially as follows:

It covered all hardwoods, but as it required gradual development, the operation was begun with one wood only, oak being the wood selected for that purpose, as it was most largely produced; and a comprehensive division and classification of the product was provided for. (R. Vol. I, p. 81.)

With reference to reports and other means of operating the plan, it was provided:

(1) That production reports should be made to the secretary monthly by each member, with the grades and thicknesses classified as set out; that monthly reports be made whether there be any production or not, in order that the secretary's records might be complete; and that the report be mailed by members not later than the 8th of the month.

(2) That the secretary should send once a month to each member of the association a summary of the production for the previous month of all the members, subdivided as to grade, kind, thickness, etc.; the report to be mailed to the members not later than the 15th of each month and to cover the preceding calendar month, but the production of each member was not to be shown separately.

(3) That sales reports should be made daily, and should show all sales and cancellations made that day; such reports to be made whether there were any sales or cancellations or not; and that the reports should be exact copies of orders taken, and should include all sales, large or small, and all special agreements of every kind in reference to price, grade, or terms, whether written or verbal; that members making sales to themselves or allied companies for flooring plant or other manufacturing purposes should report same to the secretary, but such part of the report would not be included in the report by the secretary to the members, this information being given to the secretary that he might keep balances correctly; that for the purpose of this report a carload should be considered as containing 15,000 feet of rough lumber, 12,000 feet of bill stock, or 20,000 feet of surfaced lumber; that in the report to the members the secretary should divide the customers into two classes, A and B; class A to include all wholesalers, retail yards, and all others who resell excepting exporters, and might include those put in class A by unanimous consent of the members; and class B to include all consumers who do not resell the stock as lumber, including exporters; that class A reports to members should show the quantity, grade, kind, and thickness, giving the name of the member selling, the name of the customer, the price, the place shipped, and f. o. b. what point price is made; and that if the price was not f. o. b. destination, the secretary's office should adjust the price in reporting, so

that the report would show the price f. o. b. destination; that the reports of class B should be the same as class A except the name of the shipper, the name of the customer, and the place shipped were not to be shown in the report to the members without the consent of the shipper; and in place of the actual destination the prices should be figured back to a Cincinnati basis, and the territory into which the lumber was shipped should be shown; and the secretary should give to each reporting member the price at which other members were selling any consumer, without giving the name of the seller except by his consent; that a member might write the secretary of his desire to disclose the name of the customer to others selling such customer without giving any names, and after getting replies the secretary should make disclosure of the name of the customer among those willing to have their names given to others selling such customer; that class A and B reports should both be made weekly, and mailed by the secretary not later than Saturday of each week, and should include figures up to Tuesday night of the same week; that the sales to members for direct shipment should be reported to the secretary, but were not to be reported by the secretary to the members. It was explained that the reasons for dividing the customers into two classes were, first, because the grade basis upon which lumber is sold to wholesalers and yards is more nearly standard, and therefore the prices offer a better basis of comparison; and, furthermore, the wholesalers and retail yards

buy in open market, and are known to practically all the members, and it was thought while there might be objection to giving the names of all customers at first, there would be no objection to giving the names of those included in class A; and it was expected that the provision that any buyer could be placed under class A by unanimous consent would result in a gradual enlargement of class A as the plan would develop by actual operation. It was further explained that a number of members would object to immediately giving full information as to those under class B for the reason that many consumers use special grades, and a good many manufacturers would feel that they were giving away trade secrets by disclosing such information; but it was believed by the committee that such objection would gradually disappear. (R., Vol. I, pp. 82, 83.)

(4) That shipping reports should be made daily by members in the same manner and under the same provisions as reports of sale, to include exact copy of the invoice, all special agreements as to terms, grade, etc.; that those having several mills might consolidate the reports as if they represented one plant; and that the shipping report should show the order number.

(5) That the secretary should make reports of shipments to all members, classifying them under A and B exactly as provided for under the heading of sales, such report to be made by Tuesday of each week and to include reports up to Thursday night of the previous week.

(6) That each member should report monthly to the secretary, showing the amount of stock in each grade and kind and thickness on hand the first of the month, such report to be made in three columns, the first two columns showing the total stock on hand, both sold and unsold, divided into green and dry, and the third column showing the total stock of each kind, grade, and thickness sold; that in figuring carload orders the standard footage stipulated for each car should be used in arriving at the number of feet sold; that the division of lumber into green and dry should be made according to the standards adopted by the firm reporting as to whether stock was green or dry enough for shipment; that such reports should be made as soon after the first of the month as possible, and should reach the secretary's office not later than the 5th of the month, and the secretary should compile all reports into one report showing the individual stock each member had reported, and also a summary of all stocks, green and dry, sold and unsold.

(7) That price lists should be filed by each member with the secretary at the beginning of each month at the same time of filing the stock reports, either as a separate list or by putting the prices on the stock lists; that the prices should be made f. o. b. shipping point, which point should be given in the report, or the prices might be made on the same basis as members usually make their price lists; that changes of prices should be filed with the association currently as soon as made, but that it would not be compul-

sory for any member to follow the price list or the changes which he reported to the association.

(8) That not later than the 10th of each month the secretary should send out a summary of the price lists showing the prices asked by each member, and as soon as any changes should be reported by any member such information should be immediately transmitted by the secretary to all members.

(9) That each member should furnish the secretary freight rates to the following points from basing point in his price list, to wit: Chicago, Cincinnati, Cleveland, Indianapolis, Detroit, Buffalo, Pittsburgh, New York, Boston, Columbus.

(10) That an inspection service should be established for the purpose of checking up grades; that such service should consist of a chief inspector and sufficient assistants to do the work properly, it being estimated that it would require one inspector for 50,000,000 feet of mill production.

The purposes of the mill inspection services were--

(*a*) To check up the green graders and make a report showing the direct comparison between the mill grading and the association grades on the same stock.

(*b*) To get a check on grades and measurements of each mill on shipments to consumers under class A, the inspector being required to make a report to the secretary showing the grading of the mill on shipments, and also showing the association inspector's grading on the same shipments, such report to be sent to all members.

(*c*) To check up grades and measurements on shipments to customers under class B when requested by any member and agreed to by the member shipping.

That the inspectors should attend to the usual inspecting duties, and were to be rotated between different mills and market inspection work, and be checked up by the chief inspector at frequent intervals; the chief inspector being required to get them together at least once in 60 days for instructions; that the inspection work should be at the expense of the association; that special rulings by the grading committee on any points should be sent to members promptly; that members should not employ association inspectors without the consent of the grading committee, and that it was not the purpose of the inspection to change any member's grading, or to instruct the member's inspectors to grade in any other manner than that desired by the member, *but to furnish each member a basis upon which he could compare his prices with those of other members, thereby making the price reports more intelligible and accurate.*

(11) That the basis of weights specified should be used by the secretary in figuring freights.

(12) That meetings should be held once a month at Cincinnati or at points to be agreed upon by the members; and it was recited that the plan required the selection of a man to take charge of the gathering and dissemination of data, with the necessary assist-

ants; and that the secretary should telegraph at the expense of members for any reports which were overdue; and that he should keep a list of all the members, with the time each report was due, based upon the mail service from the member's office; and that all reports were subject to complete audit. The last paragraph reads as follows:

> Part of the plan is a market report letter to be gotten out monthly. This will give the committee's idea of the market, will point out changes in conditions both in the producing and consuming sections, the comparison of production and sales, and in general an analysis of the market conditions. (R., Vol. I, p. 87.)

There is no question, therefore, that there was an agreement or combination between appellants. But whether or not that agreement was in restraint of trade within the meaning of the Antitrust Law must be determined from the nature of the agreement, what was done pursuant thereto; what was accomplished by those activities; what it was intended should be accomplished thereby; and what, according to economic laws, directly and inevitably resulted therefrom.

This action is not predicated upon any activities prior to the combination of the two associations in January, 1919; and hence the proof is confined to what was done pursuant to the above plan by appellants between that date and the filing of the bill on February 14, 1920.

SALES REPORTS.

The record does not contain a copy of any of the itemized reports of sales made by the respective members to the manager; but the character of those reports is shown by the weekly sales reports prepared by the manager, and printed and distributed among the members of the association. Copies of two of those reports, one for the week ending January 25, 1919, and the other for the week ending January 31, 1920, appear as Exhibits A and B to the bill.

Exhibit A was the first report made by the manager; and it was prefaced with an "Introduction," which reads as follows:

> Cooperation, not competition, is the life of trade. That is a modern business slogan, with a twentieth century ring to it. And it explains why one of the most significant and widespread movements among the business men of America during the past ten years has been that toward organization.
>
> Not only is it true that when men in the same calling come together to discuss the common good they are bound to take hold of new ideas and absorb information which they can apply with profit to their own business, but it is also true that the public looks with respect upon the vocation which is important enough to have an organization. Nothing succeeds like success; and a vigorous trade organization bespeaks the presence of successful men in the business, for the association is usually the evidence of live wires.

The association, by and of itself, doesn't amount to anything. Its value is not derived from being able to say "I belong," but from actually taking part in its work, doing something, and helping to make it a live factor in the trade. To get anything out of an association, therefore, you must put something in. Interest, for one thing. If you are interested in a thing, you will give time and thought to it.

The manufacturer who thinks he is beyond the reach and need of association work is reasoning without logic on his side. The probabilities are that he needs the association more than it needs him. No man but can certainly profit from contact with members of the trade who have studied the proposition from more angles, probably, than it has been his privilege to do.

The open competition plan is one of the very important and profitable phases of association work. It is simply a methodical method of recording past transactions. Membership in the plan is not compulsory, but members who enter into the plan and practice the idea of a fair deal for all, eliminating suspicion and acting with good will toward each other, will find that returns come back to them with added interest in dollars and cents.

Sales reports will be issued regularly each week. The report for this week follows; read it carefully, and if there is anything that you do not understand please write us at once. (R., Vol. I, orig. p. 44.)

This introduction was followed by a full explanation of "The plan" of the report; and it was added that for the purpose of comparison with standard grades a table of differentials for special widths and lengths, resawing, kiln-drying, surfacing, etc., was in course of preparation, and would be reported as soon as completed.

The extent of the report and the report itself shows that nothing was omitted which would facilitate an exact comparison of the lumber sold with the lumber owned by the member. And the price of each sale was figured to include freight to the basing point or gateway, that is, Cairo for the Southern territory and Cincinnati for the Eastern territory; and as each member knew the freight charges on his lumber from the point of manufacture to these gateways, he could make no mistake as to the prices received by those making sales for the particular grades of lumber owned by him, and what such price would be at his mill.

In the first report there was given (R., Vol. I, orig. pp. 46–52) the average f. o. b. gateway prices based on standard American Hardwood Manufacturers' Association grades as ascertained from actual sales report and from information obtained from other sources based on actual transactions. Then follow (R., Vol. I, orig. pp. 53–76) every sale made during the week of every member reporting, the report showing the kind, grade, and thickness of lumber and the number of feet sold, its average price at gateway, average price at destination, the de-

livered price to the customer, and its point of destination. The reports of the Southern territory (R., Vol. I, orig. pp. 52–60) were separate from those of the Eastern territory (R., Vol. I, orig. pp. 61–76), the gateway for the former being Cairo and for the latter Cincinnati.

The report distributed among the members for the week ending January 31, 1920, like the one distributed a year previous, showed the sales during the week of each member reporting, giving the date of sale, quantity, and thickness of the lumber sold, destination, and the delivered price to the customer, and the price including freight at the gateway; but instead of sending a separate report showing average prices at the gateway of the various varieties, sizes, and grades of lumber, such average price for each variety and grade appeared in an additional column of the report.

The great increase in the number of sales reported is indicated by the fact that the individual sales for the week ending January 25, 1919, appear on 24 pages of the record (R., Vol. I, orig. pp. 53–76), while in the report for the week ending January 31, 1920, they occupy 71 pages (R., Vol. I, orig. pp. 78–148), having increased about threefold.

MARKET CONDITIONS.

The information called "Market conditions" were obtained from and distributed among the members of the association in this way. A questionnaire was prepared and copies furnished to each member, and

each was supposed to send in weekly an answer to all of the questions propounded. The manager then prepared a report for distribution; and in that report summarized the answers to a number of the questions for general answers, but the several answers to the other questions were all printed in full. The record does not include the answers given and transmitted by the several members to the manager, but apparently it does include all the weekly reports prepared and distributed by the manager. (R., Vol. I, p. 224–Vol. II, p. 1052.) The reports prepared by the manager of course show exactly the nature of the reports received by him from the members.

The first report in the record was that for February, 1919, and includes only the Southwestern territory. (R., Vol. I, pp. 224–245.) The report dated March 1, 1919, includes both the Eastern and the Southwestern territories. (R., Vol. I, pp. 244–283.) The last report was dated February 1, 1920, and at that time the association appears to have been divided into four territories, the Memphis, the Western (R., Vol. II, pp. 993–1020), the Southwestern (R., Vol. II, pp. 1021–1037), and Little Rock (R., Vol. II, pp. 1038–1051). Between the two periods there had been some changes in the questionnaire; but an understanding of the nature of the several reports may be had from a brief analysis of the reports mentioned; that is, the one dated March 1, 1919, and the other dated February 1, 1920.

The first question in the report for March 1, 1919, was:

> Measuring by the number and live character of your inquiries are they better or worse during the past 30 days as compared with the preceding month? And what per cent either way? (R., Vol. I, p. 244.)

The answer of each member reporting was set out in the report for distribution. This question does not appear in a number of the last reports, it being embraced in other inquiries.

The second question in the report for March 1, 1919, was: "From what source is the present demand coming?" The answer of each reporting member to this inquiry was given. (R., Vol. I, pp. 246–247.)

In the report of February 1, 1920, both of these inquiries were answered together for the Eastern, Memphis, and Southwestern territory (R., Vol. II, pp. 972, 993, 1021); and on account of the very great increase in membership, instead of reproducing the answer of each member a summary of the several answers was given; that is, there was stated the average per cent of inquiries and orders from each of these classes of customers: Wholesalers (domestic), wholesalers (export), furniture, automobile, flooring, interior trim, vehicle, box manufacturers, oil wells, coal mines, railroad car lumber, railroad switch ties, car manufacturers, retail yards, and miscellaneous.

For the Little Rock territory the two questions were answered separately, but the answers were

summarized as in reporting for the other territories. (R., Vol. II, p. 1038.)

In the report for March 1, 1919, the third question was:

> Speaking generally and ignoring exceptional orders peculiar to your business, what is your view of market conditions during the past 15 days as compared with the preceding 15 days, and what has caused the change, if any? (R., Vol. I, p. 268.)

The answer of each reporting member was given in full. This question did not appear in the last reports, but its substance was contained in other questions.

The fourth question in the report of March 1, 1919, was:

> How long would it take you to ship out total orders on hand, working under normal conditions and assuming that all orders you have on your books are ready for shipment? (R., Vol. I, p. 270.)

The answer of each reporting member in response to this question was given. This question was No. 3 in the report of February 1, 1920; but instead of giving the answer of the several members in full, a summary of such answers was given (R., Vol. II, p. 973); as, for illustration, in the report for the eastern territory the summary is:

"1 week	2	30 days	10
10 days	1	6 weeks	6
2 weeks	6	60 days	5
3 weeks	3	90 days	1

Average this month, 34 days; average last month, 34 days." (R., Vol. II, pp. 973, 994, 1022.)

Question 5 of the report of March 1, 1919 (R., Vol. I, pp. 252–273) and Question No 4 of the report of February 1, 1920 (R., Vol. II, pp. 974, 995, 1023, 1041) called for a full report on *production*. Both of the reports contained the report of each member reporting, which showed his normal monthly production, present monthly production, and the per cent of normal production; and in the report of February 1, 1920, there was also given the estimated production for the next 60 days and its per cent of normal. There was also added an average or summary made from the reports of the several members. And in the report of March 1, 1919, a comparative summary was given for the two preceding months, while in the report for February 1, 1920, a summary was given for the six months preceding.

The sixth question in the report for March 1, 1919 (R., Vol. I; pp. 254, 274), and the fifth question of the report for February 1, 1920 (R., Vol. II, pp. 978, 1000, 1025, 1044), called for a full report of *stock*. And both reports contained the statement of each reporting member, showing his normal stock, his present stock, and the per cent of stock on hand above or below normal; and in the report of February 1, 1920, and a number of reports preceding it, there was also shown the present stock both sold and unsold and the per cent of unsold stock to normal, which gave a still more accurate knowledge of the actual condition of the lumber industry.

Question 7 of the report of March 1, 1919, and question 6 of the report of February 1, 1920, was:

> Are your labor conditions any different from 30 days ago? Are they better or worse? Give reasons for changes, if any. (R., Vol. I, p. 256; Vol. II, p. 980.)

And the answer to this question of each reporting member was set forth. (R., Vol. I, pp. 256, 276; R., Vol. II, pp. 980, 1001, 1027, 1046.)

Question No. 8 of the report of March 1, 1919, was:

> How is the car supply as compared to 30 days ago? (R., Vol. I, pp. 258, 278.)

This question was question No. 7 in the report of February 1, 1920, but was amplified as follows:

> How is the car supply at the present time? Better or worse as compared with 30 days ago? What percentage of your requirements are you getting? (R., Vol. II, pp. 982, 1004, 1029, 1047.)

In both reports the answer of each reporting member was given.

Question 9 of the report of March 1, 1919, was:

> How are your collections as compared with 30 days ago? (R., Vol. I, pp. 260, 280.)

This question, thus stated,

> How are your collections? Are they better or are they worse as compared with 30 days ago?

appears as No. 8 in the report of February 1, 1920. (R., Vol. II, pp. 984, 1007, 1031, 1048.) And in

both reports the answer of each reporting member upon this subject was set out.

Question No. 9 in the report for February 1, 1920, was:

> What per cent of normal, for this time of year, is your present supply of logs banked ahead of the mill? (R., Vol. II, pp. 986, 1010, 1032, 1049.)

Under this question the answer of each reporting member was set forth. The questionnaire in use on March 1, 1919, and those used for some time thereafter did not contain this question. Manifestly it was an important one, because the log supply is an important factor for consideration in determining future production.

Question No. 10 in the report for February 1, 1920, was:

> "Do you expect to be shut down within the next few months on account of shortage of logs or for any other reason? If so, please state how long mill will be idle. (R., Vol. II, pp. 988, 1013, 1034, 1050.)

And the answer of each reporting member was given. This question did not appear in the report for March 1, 1919, or in a number of reports thereafter.

The tenth question in the report for March 1, 1919, was:

> What is the general outlook for business? (R., Vol. I, pp. 262, 281.)

In the report for February 1, 1920, this question amplified appears as No. 11, as follows:

> What is your view of market conditions for the next few months? What is the general outlook for business? State all reasons for your conclusions. (R., Vol. II, pp. 990, 1016, 1036, 1050.)

It will be observed that the question as propounded in the first reports only called for an opinion as to the business outlook, while the question as propounded in a number of the last reports called, not only for an opinion, but also for a discussion of business conditions. And under this question the opinion and reasons therefor of every single reporting member was stated, and the report thus constituted a vehicle through which every member expressed his views with reference to prices and the various elements which entered into the making of prices to every other member of the association. How this opportunity was taken advantage of appears from an examination of this section of the several reports. And as an illustration the *substance* of the answer of each reporting member to this question as set out in the report of February 1, 1920, is here given, to wit:

Eastern territory.

> American Column: The business will continue with perhaps more activity. If prices continue to rise will injuriously affect lumber industry by curtailing consumption, helping substitutes, and hastening a reaction.

Cherry River: Outlook very promising; stocks are short.

Clearfield: Looks good. Seems to be no lack of demand.

Gennett: Prices will remain high as dry lumber diminishes during next 3 months. Will be plenty of dry lumber by midsummer, but believe demand take care of supply.

Kentucky: Will continue good.

Little River: Demand continues far in excess of supply and condition will likely continue for some time. Our opinion is that prices are too high. High prices are the cause of so many scrub mills, and the production will eventually be greater than demand, although do not expect that condition for several months.

Mowbray & Robinson: Demand will continue far in excess of supply because stocks of all grades scarce.

W. M. Ritter: For next five months at least all hardwoods available and offered for sale will be snapped up.

Vestal: Fine until September first.

Farris: As long as present famine of dry lumber exists prices are certain to advance or at least maintain present high level.

Bond-Foley: Outlook good on account shortage of stock.

Burns & Knapp: Demand far exceeds supply. Outlook for spring business very good.

Spice Run: No slackening in demand, and increased values. Danger of prices reaching point where lack of supply and demand will not apply.

Pardee & Curtin: Very fine.

Smoot: Price of lumber high because of the shortage of stock caused by floods.

Wilson: Think conditions favorable because of underproduction and good demand.

Nigh: Indications are that demand will hold up for a time at least.

Ranwood: Outlook very good. More business offered than can supply.

Guyan: See business to be about the same.

Lee & Fooshee: Appears good.

Andrews: Look for good demand with higher prices because supply not equal to demand. Short stocks and continued rains in South. Buyers begging for lumber at any old price.

Wood-Mosaic: Will be very good. Not large amount of stocks available, and trade consuming same.

H. M. Page: Think market will be good until about July 1.

S. M. Bradley: Looks good to me.

Tellico River: Anticipate a remarkable demand for all kinds of lumber and at good prices. Buyers holding back and money plentiful. Manufacturers pressed for goods and must supply the demand.

Wilson Bros.: Good demand. Are practically sold up to green lumber.

Russell Hdwd.: Looks good to us because first, seeming scarcity; second, general tendency to build.

Williams & Voris: Think market will be exceptionally good for next six months, and the present high prices will prevail until late

in the fall. Do not look for much decrease even then.

Evansville-Band: Prices will hold up on account of shortage of stocks.

These answers are followed by the following summary by the manager:

"Reports uniformly express a favorable outlook for business until well on to fall of this year. The demand continues to take up all available stock with no present prospects of an early increased supply." (R., Vol. II, p. 992.)

Memphis territory.

Him-Harris: Will continue about same as at present, and prices may go a little higher as logging conditions show no improvement.

Lamb-Fish: See no reasons for decline in prices. Exporters endeavoring to buy. Domestic demand strong. Production limited. Bull market in for long pull.

Wisconsin: Possibly some further improvement in prices, but believe top has been reached. Demand should continue good for some months at near present prices.

George C. Brown: Cannot see anything but good. Stock continues low.

James E. Stark: Continue good.

Penrod-Jurden: Stocks will continue short and prices strong. Perhaps even increasing as the spring buying starts in earnest.

Hemphill: Conditions still look good on account of demand and shortage of lumber.

Carrier: Think it will take six months or more for production to become normal, and

demand will continue to exceed supply, which means present prices are high for that length of time.

Gayoso: Look for good business during next few months, as demand is greatly in excess of supply. Production continues unsatisfactory and below normal.

J. H. Leavenworth: Very good demand. Supply low, production under normal.

Tallahatchie: Conditions should be good for at least 8 months. Will take that time to accumulate normal stocks.

Kraetzer-Cured: Think demand will exceed supply for some months.

Ashby: Looks good until production increases. See no reasons why prices should not remain same if not advance.

Barr-Holaday: Think business will continue good for some time, as demand continues good and little chance for surplus accumulating.

Howe: Good—because shortage of production and good demand.

V. O. Jones: Good. See nothing ahead but upward tendency for several months. Demand still exceeds supply.

Brown-Everts: Look for still higher prices until supply catches up with demand. Market should be strong for 4 to 6 months at least.

Kellogg: Good business should hold for at least 6 months.

Nickey Bros.: Conditions should remain firm, with an increased demand for all hardwoods.

D. H. Hall: Think market will be good. Also general business good. No overproduction on account of labor.

W. E. Small: Demand and prices will be good.

Sou. Drain: Looks good to us. Great log shortage and restricted production; will take some months to catch up.

White River: Good for all of 1920.

Woods: Outlook good.

Campbell & H.: Will go higher.

Ferguson Hdwd: Think market will continue strong for few months on account of extreme short supply.

Grismore-Hy.: Very favorable.

Bayou-Land: Good.

Miller: Good.

Bedna Young: Believe market will be strong for a few months, with higher prices on most items; logging conditions bad and stocks getting lower.

Henry H. Lesh: Outlook good. Supply below demand.

Belgrade: Market will continue to advance until weather will permit greater production.

H. W. Darby: Prices will hold. Many items will advance during next 30 to 60 days on account of heavy demand and scarity of dry stock.

Russe & Burgess: Good. Principally because there is not enough goods to supply demand.

L. D. Murrelle: Conditions fair to good. May change overnight, due to continuous skyrocketing of prices.

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Brinkley: Good for 4 months. Think will be lull in buying by June.

James E. Bell: Expect to sell all we can manufacture at increased prices. Outlook for business good.

F. T. Dooley: Good. Believe will be plenty of business for next few months. Furniture factories busy, building trade will have plenty of work.

Darnell-Love: Good. Present supply logs and lumber very low.

Cypress: National or world financial conditions only thing to prevent a very large demand for lumber throughout spring months.

C. A. James: Market conditions should be good for next six months due to scarcity of lumber and weather conditions in South.

L. Cowee: Can see no general change in market conditions for six months on account of low production. If any change, prices will go higher.

Dickson & Shan: Will remain firm. Weather conditions unfavorable to get raw product.

The manager's summary of these answers is as follows:

> "Reports express a favorable view of market conditions for the next few months. There has been little or no improvement in the logging situation over 30 days ago, so the probabilities of an immediate increased production are lacking; while the demand continues apparently as strong as ever." (R., Vol. II, p. 1020.)

The answers for the Southwestern territory are as follows:

Cybur: Conditions look O. K. Outlook good.

Lyon: All looks favorable with still higher prices.

Phil A. Ryan: Out of sight. Users of lumber are actually begging for lumber. Price no object. Take months to fill the vacuum.

Hillyer-Deutsch-E.: Odds in favor of some higher prices with steady tendencies; good outlook; demand exceeding supply.

New Deemer: Can see nothing but strong demand as a result of shortage.

Brewer-Nienstedt: Can not see how supply can catch up with demand before July. Should therefore be a seller's market.

Wilson & Cochran: Every indication for further advance in price during next few months. Are afraid to guess what will happen after that.

Faust Bros.: Good. Lumber stocks very low. Weather very unfavorable.

Newell: Good, because scarcity of green and dry stocks.

Alexandria Coop.: Everything points to continued heavy demand with most serious car shortage. We look for even higher prices.

Huie-Hodge: Hardly expect any radical decline within the near future; looks good to us.

Bernice: Good. General stocks in continued demand.

T. C. Clanton: Market should hold for next 60 days if weather conditions continue as in past 60 days.

R. F. Learned: No reason to anticipate an early let-up in demand nor very material increases in supply until logging conditions have improved long enough for lumber to be made and dried.

Eastman-Gardiner: Look for market to be good for coming three months. Stocks short and manufacturers using all they can get.

Davis Bros.: General outlook is good.

Holly Ridge: Conditions will be good for several months and prices will be high. Supply limited and demand big.

E. L. Hendricks: See no reason why market should not remain as strong for several months as at the present time because of low production.

Hardwood Lumber Co.: Good if we could produce lumber.

Sherrill Hdwd.: Will be a strong demand on account of no stocks and prices are bound to go higher.

Dubois: Very good. Bad weather has reduced log supply, and stocks are low. Would take three months of good weather to dry out the swamps.

H. J. Wilson: Good; prices will hold or improve.

L. N. Kimerer: Looks good from inquiries and no dry stock at any of the small mills in this part of the country.

To these answers the manager attaches the following summary:

"Indications point to a continued good business for the spring months and into the coming summer. There is little probability of

more plentiful stocks of hardwoods for months to come and this [the] prevailing opinion from the above reports is that the present demand shows no signs of falling off." (R., Vol. II, p. 1037.)

Little Rock territory.

Freeman-Smith: Do not believe prices will drop, because not enough hardwood to fill demand for four months.

Jefferson Hdwd.: Business looks good and prices will continue high until production catches up with demand.

Jerome Hdwd.: Conditions should continue good for next few months because of scarcity of dry stocks and mills unable to log.

Dorsey Land: Conditions should remain good until production picks up.

Brown & Hackney: Think market will continue good as long as present logging conditions continue; until price of logs and timber decreases and supply of logs increases demand for lumber will exceed supply; and prices can not decrease.

Fordyce: General outlook excellent. Anticipate heavy buying for several months.

Perkins Bros.: Think lumber will remain at present level. May be some higher until good logging weather.

Fee-Crayton: Think next few months will remain as now on account demand exceeding supply.

Thomas E. Powe: Lumber scarce and prices strong for 90 days.

J. M. Jones: See nothing but good prices for several months.

Edgar Lbr.: Good; reasons, supply and demand.

Tschudy: Prices can not go lower, on account of shortage of lumber and logs and weather conditions.

Crossett: Present prices likely to remain high, with strong demand. Will be some advances for special stocks. Unsettled conditions in all lines of business makes guessing hard.

The Arko: Good. Consumers buying heavy for their needs, indicating general confidence in present market.

The summary of the manager was as follows:

> "The general outlook is good. There is no apparent falling—[copy torn]—in demand and little prospects of increased supply." (R., Vol. II, p. 1052.)

The extremely favorable comments and predictions of high prices are especially noticeable after about November, 1919.

MARKET LETTERS.

The manager also sent to the membership a weekly letter, in which he discussed various subjects of interest to the members, but they were devoted principally to conditions affecting production and other elements which control prices. The nature of these letters will appear from the following quotations taken from them.

From special market letter dated March 1, 1919:

> The report of stocks on hand and unsold as of February 1, 1919, develops a situation that we believe is unparalleled in hardwood lumber industry. In no single month within our recollection has there been such a large and general decrease in stocks on hand as shown by this report.
>
> On January 1 the total stock of hardwoods on hand and unsold was 550,000,000 feet, on February 1 it was 460,000,000 feet—a decrease during the month of January of 90,000,000 feet, or 16.6 per cent of the total. These figures are comparable, the result having been obtained from reports made by the same mills in each instance.
>
> The chief factors contributing to this situation are curtailed production and increased volume of sales. (R., Vol. II, p. 1062.)

* * * * *

At this rate it will not be long before there is a famine of hardwood lumber. We hear a great deal about the waiting attitude of the buyer with the expectation of price recession, but with such conditions as are recited above it is difficult to understand why holders of hardwood lumber need worry as to the future. The buyer may wait too long—in fact, he has waited too long, as present conditions surrounding production and stocks hold out no temptation to move stocks by means of concessions. Stocks are so low that in some cases the holders are not disposed even to offer what they have. With stocks low and

ill assorted, and with no prospect for restoring them to even last year's meager quantities, the outlook for strong prices on all hardwoods could not be better. (R., Vol. II, p. 1063.)

From stock report dated March 8, 1919:

The Southern Lumberman says: "* * * During this crisis there is no question but that the information as to production and supply which has been available to the producers through the medium of the association has been of very marked assistance and value. If a manufacturer knows just how much of any one item there is in the country and how much is being produced it does not take very keen insight into economic conditions for him to realize what is the best thing for him to do.

"For instance, at the recent meeting of the open competition plan of the American Hardwood Manufacturers' Association in Memphis the fact was developed that the production of mills embraced in that group of manufacturers is at the present time only 56 per cent of normal; and that practically the same situation exists throughout the hardwood-producing territory. It was also shown that stocks at mills are only about three-quarters of normal, the number of mills having any oversupply at all being practically negligible.

"With this information before him it is difficult to see how any intelligent hardwood manufacturer can entertain any hesitation as to the proper course for him to pursue in selling his lumber. Certainly in any other industry the buyers could never expect any-

thing but an advance in price when the supply is below normal; the production is far below normal, and the demand is improving."

The stock reports of the association have become one of the most detailed and complete statistical publications issued by any association in the world. The members who are not cooperating in this feature of association activity owe an obligation to their fellow members to give the fullest information from some of our members. The moral is that an association member who does not keep personally in touch with others in this phase of the American statistical service is demonstrating that he is marching a league or two behind the procession. (R., Vol. II, pp. 1063, 1064.)

From letter of March 15, 1919:

This letter was devoted to a discussion of the Redfield plan, and after undertaking to state the causes of the abnormal conditions it was said:

To meet this situation the President has authorized the appointment of a board known as the Industrial Board of the Department of Commerce. This board will in no sense control or interfere with prices, etc. The board does not have, and does not desire to have, the power or authority to fix prices. Its object will be to enable industry to do just what any group of intelligent business men would deem it best to do under the circumstances, upon their own initiative, by unanimous action if they had the opportunity; it will provide a forum in which industry can meet and agree upon a policy for itself at the instance and with the approval of the Government.

Certainly the lumbermen have no reason for not entering heartily into this plan. Perhaps there is no class of manufacturers who can better afford to lay their cards in plain sight on the table and let the Government or the public decide whether the present selling price of lumber is unreasonably high. Any publicity along this line is sure to be of benefit to the lumbermen.

This plan has been fostered by a lumberman, a member of this association, and the individual lumberman should realize that it is aimed at his individual betterment and is worthy of his support. Imagine what a stimulus to lumber buying it would be should this board, after conference with representatives of the industry, publicly declare that the prices now being asked for lumber are reasonable and not at all out of proportion to the cost of production. And any investigation of the facts is certain to disclose that such is the case.

Get behind the Redfield plan. It deserves your endorsement and approval. (R., Vol. II, p. 1066.)

The letter of March 22, 1919, is in full as follows:

The prime object of the open competition plan is to help trade conditions.

It is one thing for men in a meeting to say, one after another, "My price is so and so," with the result that after the meeting all their prices prove substantially the same as the figures mentioned.

It is quite a different thing for the same men to come to a meeting and each report, "My actual sales for the past month have been so and so, and I have reported the details of each transaction to the association."

In that statement there is no direct or implied agreement to maintain prices, no obligation of any kind to refrain from cutting.

The theoretical proposition at the basis of the open competition plan is that,

Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.

The open competition plan is a central clearing house for information on prices, trade statistics, and practices. By keeping all members fully and quickly informed of what the others have done, the work of the plan results in a certain uniformity of trade practice. There is no agreement to follow the practice of others, although members do naturally follow their most intelligent competitors, if they know what these competitors have been actually doing.

The monthly meetings held in various sections of the country each month have improved the human relations existing between the members before the organization of this plan. If you have not attended these meetings you have overlooked something. The following meetings will be held during the month of April:

Cincinnati, Ohio.—Hotel Sinton, Saturday, April 5.

Memphis, Tenn.—Hotel Gayoso, Friday, April 11.

New Orleans, La.—Hotel St. Charles, Wednesday, April 16.

Jackson, Miss.—Hotel Edwards, Friday, April 18.

Every member of the plan is requested to send a representative to at least one of these meetings. (R., Vol. II, pp. 1066, 1067.)

From market letter dated March 29, 1919:

Reliable statistics gathered by this association indicate that stocks on hand at present are only about 60 per cent of normal. Certainly consumers of hardwood have not been informed as fully with respect to this situation as they might have been. The Southern Lumberman says: "As a matter of fact, very likely no considerable percentage of the hardwood producers themselves, even those who know a shortage exists, realize that this shortage is acute." Naturally the situation ought to have an important bearing on the plans of every hardwood lumberman if the facts were better understood; offers of business now at shaded prices would get scant consideration and there would not only be no good reason to cut prices, but there would be every reason why they should be held at reasonably profit-making levels.

Everybody agrees that the future is bright for lumber and that the hardwood trade need have no misgivings as to the future. When these good times come, stocks will be found far too little to supply the demand, and it

isn't possible to replenish stocks overnight. Manufacturers naturally are not going to sell very far ahead at the present level of prices, as all conditions indicate a firm market for the balance of the year, with prices moving upward and with a strong demand for every foot of lumber that the mills can possibly produce. (R., Vol. II, p. 1068.)

The letter of April 5, 1919, was devoted entirely to giving reasons why there should be a building boom, and urging organization for that purpose. (R., Vol. II, pp. 1069–1070.)

From letter dated April 12, 1919 (Organization and Cooperation):

> The open competition plan of the American Hardwood Manufacturers' Association is to-day one of the largest, if not the largest, both in membership and volume of business reported, open price plan in existence. (R. Vol. II, p. 1070.)
>
> * * * * *
>
> An open competition plan is not an easy thing to operate successfully. On the contrary it is one of the hardest things imaginable to carry on among a body of business men who have been used to the old formula "Competition is the life of trade."
>
> Numerous open-price plans have been established and are in successful operation in numerous industries. Others have failed, mainly because they sought to use the plan as a cloak for price fixing.

The open price does not control prices and end competition, hence men who wish to do these things are disappointed. Only broad-minded and far-sighted men have the patience to follow the plan and look for results in the future. That we have men of that kind in this association is evidenced by the success the open competition plan has attained.

Competition, blind, vicious, unreasoning, may stimulate trade to abnormal activity, but such condition is no more sound than that medieval spirit some still cling to of taking a club and going out and knocking the other fellow and taking away his bone.

The keynote to modern business success is mutual confidence and cooperation. Cooperative competition, not cut-throat competition. Cooperation is a matter of business because it pays, because it enables you to get the best price for your product, because you come into closer personal contact with the market.

Cooperation will only replace undesirable competition as you develop a cooperative spirit. For the first time in the history of the industry the hardwood manufacturers are organized into one compact, comprehensive body, equipped to serve the whole trade in a thorough and efficient manner. The association is doing a great work and its usefulness as a factor in the lumber industry is now thoroughly realized by the progressive lumberman. What has been done thus far has been through cooperative effort. While the scope of the association's influence is already widespread, its work must be intensified through a bringing into the fold of all producing interests.

It should require no unusual power of persuasion to convince others of the desirability, the indispensable necessity of getting together. We must get together; times have changed and will change still more. Give your association a thought occasionally. More members mean more power to do more good for the industry. *With cooperation of this kind we will very soon have enlisted in our efforts practically every producing interest, and you know what that means.* (R., Vol. II, p. 1071.)

From the letter dated April 19, 1919:

The first step toward the development of the open competition plan was to bring the units together, make them acquainted, allay their distrust, induce them to abandon the played-out policy of secrecy, agree to exchange information, and to do business on a frank and straightforward basis.

We have made great progress in all branches of our association activities since the plan has been organized and began its work on March 1, 1917, but above and beyond all of these things have improved the human relations existing between the members before the organization of this plan. While some of the members knew some of the other members, in a majority of cases they were competing with each other, even when neighbors without a personal acquaintance. These men now meet monthly—they have become very well acquainted and they have learned that they can safely depend upon their fellow manufacturers to a much greater extent than they thought would have been possible without

serious loss. Open competition means not only open prices but open discussion, and the spirit of cooperation developed at these meetings has been of prime importance not only in the success of the plan but in the success of other association activities. (R., Vol. II, p. 1072.)

From market letter dated April 26, 1919:

If there ever was a time when rich rewards awaited the producer of hardwood lumber, now is that time. There are glorious opportunities ahead.

A general survey of stock conditions as shown by the April 1, 1919, stock report, indicates that the stock on hand is 110,000,000 feet less than on hand January 1, 1919, which would indicate that dry stocks have been moving out rapidly.

Production during the month of April was a little less than 60 per cent of normal, and the estimated production for the next 60 days is 70 per cent of normal, weather conditions having improved during the past month. Stocks are now less than 75 per cent of normal, badly broken, and some items practically exhausted.

We now have what is called the "scarcity demand." In other words, the demand is far in excess of the supply. We no longer hear about the waiting attitude of the buyer with the expectation of price recession. The buyer now realizes that he has waited too long, and so great is the haste to secure requirements that orders are being placed by wire. Prices

are no longer an obstacle, and the main desire of the buyer is to get the stocks. Supply and demand must necessarily govern prices. The demand is with us, and supply inadequate, therefore values must increase, as our competition in hardwoods is only among ourselves. (R., Vol. II, p. 1073.)

* * * * *

The buyers of the country, since the armistice, have made an unexampled attack upon prices through their waiting attitude and yet price recessions have been insignificant. The reason is that we are on a new high-price level, which will be found a stubborn reality. Business men are going to find out that the clever man is not the man who waits, but the one who finds out the new price facts and acts accordingly. (R., Vol. II, p. 1074.)

The record contains no letters for May 3 and 10.

From letter dated May 17, 1919 (Stop, Look, and Listen):

The lumbermen have gone through several lean years, but we are confronted with the possibility of killing the goose that laid the golden eggs. Overproduction will spell disaster, as it should always be borne in mind that the maximum productive capacity of the sawmills of the country is much in excess of any demand the country has ever known. (R., Vol. II, p. 1077.)

* * * * *

Within the past three weeks the hardwood market has experienced the most sudden and spectacular improvement it has known for a

mighty long time. There is no more haggling over prices. The buyers' principal question these days is: Have you got the lumber and how soon can you ship it? Orders by telegraph are the usual thing. Not only is the demand extremely active, but it looks even more active on account of the acute shortage of stocks. It has been accurately estimated that there is 110,000,000 feet less of dry lumber in the country to-day than there was on January 1; and a lot of the lumber on sticks at mills has been sold and is only waiting shipment.

As a result of this situation, everything looks rosy. The demand is active, prices are strengthening—what more could the lumber manufacturer want? But at the risk of being accused of being a gloom spreader, we feel constrained to offer what we consider as a timely warning. *Although the country unquestionably faces an unprecedented era of prosperity, and although the demand for lumber—supported by the imminent improvement in the building situation—should continue apace, it should always be borne in mind that the maximum productive capacity of the sawmills of this country is much in excess of any demand the country has ever known.*

In other words, the danger which we see lurking in the future for the lumber industry—and a grave danger it is—is overproduction. When the demand for lumber is keen and the prices are good, it is necessarily a strong temptation to the sawmill man to put on a night shift at the mill and an extra logging crew in the woods and keep

turning out lumber 24 hours out of the day. The desire to cash in while the cashing is good is natural and easy to understand; but every sawmill man who contemplates putting on a night shift should stop long enough to reflect on the past history of the lumber business. If he does indulge in such reflection, the chances are that he will reconsider any ideas he may have had along that line.

Overproduction has always been the curse of the lumber industry in America. It has caused more trouble and hardship than any other one factor. It would be criminal folly, therefore, for the lumber manufacturers to indulge themselves in any such form of commercial suicide. Most of the more progressive manufacturers these days are members of some association or associations which distribute information relative to the supply and demand; and the manufacturer who does not digest that information and profit by it is an enemy to himself and to the industry.

The lumbermen have gone through some hard sledding in the past. Now the pendulum is swinging the other way, and it appears that they have within their grasp an era of steady prosperity for some time to come. They can either reach forward and seize their opportunity, or they can cast it aside by the policy of overproduction. Which shall it be? It's up to the sawmill men to decide.—Southern Lumbermen.

Are we guilty? If so, the warning is timely. (R., Vol. II, pp. 1077, 1078; R., Vol. I, pp. 57–59.)

From market letter dated May 24, 1919:

The hardwood market has taken on unusual activity during the past month. The manufacturers are unable to meet the demand because of the scarcity of hardwood lumber. Mill yards are practically devoid of dry stocks, while the demand continues to increase. Prices on numerous items have advanced several times during the month and are changing so frequently that it is difficult to say exactly what current prices are. Production during the month of April was 65 per cent of normal, and a careful estimate of production for the months of May and June does not indicate any material increase during those months. (R., Vol. II, p. 1079.)

* * * * *

If anyone tells you that lumber prices are coming down, call their attention to the following:

(1) Curtailed production of mills.

(2) Stocks at mill points are below normal and badly broken.

(3) Increased cost of production.

(4) Necessity on the part of lumber operators of maintaining a price level that will enable them to make a reasonable profit.

(5) Recent restricted building operations.

(6) Export demand.

(7) Low stocks held by consumers.

(8) Announced policy of maintaining wages at their present level as long as the high cost of commodities continues.

(9) Large amount of capital and uninvested money which may be made available for in-

vestment builders under proper financial direction.

(10) That lumber is not high in price as compared with other building material. (R., Vol. II, pp. 1079, 1080.)

No letter for May 31 is in the record.

Because of its pertinency the entire letter for June 7 is quoted:

> The open competition plan of the American Hardwood Manufacturers' Association has arrived. It is an unqualified success and any member or any manufacturer who does not think so is simply overlooking the most important of our several association activities. The information contained in the open competition sales report has made for every member during the past 30 days a profit that will pay their association dues for the next 5 years.
>
> The best boosters of the plan are the members themselves. If you have not already told of your experience with the plan, do so at once, as it is our desire to compile the information in booklet form for distribution. It will greatly aid in our membership campaign. Tangible results are convincing always.
>
> Read the following excerpts from letters written by members:
>
> "The open-price plan is the best educating system that has ever been introduced to lumber manufacturers and in our opinion should be used by every hardwood manufacturer."
>
> "Any lumber manufacturer who does not belong to the open competition plan is work-

ing a hardship on his sales department and losing money for himself."

"The feature that stands out above everything else is the fact that this report shows the man who made the sale. Price does not mean much without knowing who made the sale."

"We were credulous about this for a long time but finally decided to join. We are now convinced that it has been of great service to us, especially during the last few months, where we have been kept posted about the prices."

"Now it is a pleasure to sell because we know what we are doing and have information at our finger tips that enables us to know these things before the other fellow does."

"We believe we have profited from $500 to $1,000 during the past 30 days by being correctly informed relative to the prices stock is really being sold at."

"We joined the association simply because of this feature. If it were abolished our interest in the association would immediately cease."

"The very first report which we received under this plan enabled us to increase our price $6 per thousand on a special item in oak."

"At a recent Memphis meeting it developed our company was carrying an unusually large stock in thoroughly dry red gum and seemed to be the only one among those present who had it. Within two weeks from date of this meeting, where it developed there was a big shortage of red gum items, we found a most

unusual demand at prices we had not hoped for."

"By watching the reports we have been able to close out our dry stock at from $1 to $3 above the general quotations."

"We were a little hard to persuade to come into the plan. Now that we are in and have seen the inside workings of it we do not see how we could get along without it."

"Every time we attend one of the meetings we get some good out of it."

"The open competition plan is worth every cent and more than its cost and we would not be without it under any consideration."

"The plan is particularly advantageous to a firm who have been out of the market for some little time on account of lack of stocks, etc., and then find themselves with some lumber in shipping condition."

"The plan has done more to stabilize prices than any other one thing."

"Since we became members we have been selling our lumber at several dollars per thousand more than formerly."

"Any manufacturer who is trying to do without the help of the association is making a wonderful mistake."

"We find the weekly report of sales a very positive index of the trend of the market on all grades of lumber." (R., Vol. II, pp. 1080, 1081.)

From market letter dated June 28, 1919:

The entire hardwood market continues exceptionally strong. As a matter of fact, we have never witnessed a time when the indus-

try was so closely sold up as at present. Heavy buying continues and reserve stocks at the mills are exhausted. Former top prices are really nominal to-day. Advances are named almost daily. With cost of manufacture mounting as wages and supplies go still higher, expectations of price declines are steadily diminishing, and there is a rush to secure supplies in anticipation of additional advances. (R., Vol. II, p. 1082.)

* * * * *

It is estimated there is a building deficit amounting to 1,000,000 homes. While construction activities are now gaining headway rapidly, with every indication of reaching unprecedented proportions as the summer advances, there is no likelihood that anything approaching normal housing conditions will be obtained before the expiration of a number of years. Increased building shows confidence in the permanence of the present price level. A striking feature of the building situation is the tendency to make war-deferred repairs and additions. Reports indicate that a very large per cent of the total new construction is going into these repairs and additions.

Activity in furniture is said to be the greatest in several years. The output is reported to be 50 per cent higher than last year, most factories having sold their output up to October, and many to January 1st. Reports indicate several buyers and sellers have already attended the Grand Rapids Exposition. The dealers are eager for goods. The question they ask—and about the only one—is when can

we get the goods? It is a sellers' market, and dealers are paying the price without a murmur. (R., Vol. II, p. 1083.)

No letters appear in the record between June 28 and August 16, and the following is quoted from the letter of the latter date:

> The demand for hardwoods is such at the present time that the mills can move most any item of dry stock at their own price. The situation is simply one of supply and demand. (R., Vol. II, p. 1084.)
>
> * * * * *
>
> Production during the month of July did not exceed 70 per cent of normal throughout the hardwood territory, with an estimate of 80 to 85 per cent of normal for the months of August and September. This is the first time this year mills have had a supply of logs in sight, but lack of cars is making it impossible to get them to the plants and impossible for mills to run.
>
> Stocks unsold on August 1 show a further decrease over July 1. Mills are generally sold up on dry lumber and with the insistent demand and present rate of production this condition must continue to exist. (R., Vol. II, p. 1085.)
>
> * * * * *
>
> It is encouraging to note that Secretary Redfield, in addressing the Chamber of Commerce of the United States recently, developed the suspicious attitude of the public toward business and said that the Sherman law and any other law designed to prevent the restraint of trade should not be invoked to

> prevent the promotion of trade by cooperative methods. Let us hope that the same light will dawn on other Government authorities and that they will realize that the Sherman law, designed to prevent the restraint of trade, is, itself, one of the greatest restrainers of trade and that it should be repealed. (R., Vol. II, p. 1087.)

The next letter in the record is dated September 20, 1919, and the following is quoted from that letter:

> During the past 30 days prices on all kinds of hardwood lumber have held firm with advances on some items. During the past week orders showed a marked gain over those for the week previous. There is no let-up in the demand and all sorts of lumber are being called for, the lower grades being accepted in many cases where the best would have been preferred if it could be had. (R., Vol. II, p. 1087.)
>
> * * * * *
>
> It has been rumored that a certain class of buyers, believing that the price of lumber was too high and that the temporary inactivity in the export market offered the opportune moment, have agreed to confine purchases to actual immediate requirements during the next 60 days. This is not going to worry the manufacturers very much; in fact, it will give them a much needed breathing spell and an opportunity to accumulate a supply of dry stocks which, in our opinion, is the same as gold dollars in the bank. How any sane set of men could arrive at such a determination is beyond explanation, with production below

normal and stocks at mill unsold not to exceed a month and a half production, how can they expect their actions to have any effect on this market? But lumber manufacturers are not concerned and can afford to let the buyers take all of the time they want. It will probably mean a repetition of market conditions existing last spring, and the law of supply and demand will determine the price. We do not believe some of the buyers can remain out of the market two weeks, judging from the information we get concerning stocks of lumber in the hands of the consumer.

The flooring, interior trim, and sash and door plants are running full time, with orders booked to capacity for some months to come. New prices are being asked for flooring, which carry strong advances. (R., Vol. II, pp. 1088, 1089.)

* * * * *

Unsold stocks at mills on September 1 were 31 per cent of normal, which is equivalent to an average of less than two months' production. We urge you to read and analyze the stock report for September 1. It is the most detailed and complete statistical publication issued by any lumber association. Read the recapitulation and summary and you will see that stocks in some woods have decreased over 50 per cent since January 1. The decrease would have been much greater if the same number of members had reported stocks on January 1 as on September 1. This report contains information that is invaluable to all members, information that could not be pur-

chased at any price except through the association, and information that explains why lumber prices have advanced.

Those who have been looking for lower prices overlook the very important factors: That production continues below normal at a time of the year when mills should be piling up lumber if they are ever going to be able to do it; that unsold stocks at mills are 70 per cent below normal; that the industry faces a serious car shortage; that possibly labor troubles may intensify the situation; that the export demand has just started, and that the railroads are not buying although in need of material of all kinds. With these conditions prevailing there is nothing in the situation that should encourage any one to hope for a drop in quotations. (R., Vol. II, pp. 1090, 1091.)

From the letter for the week ending December 6, 1919:

There has been no let-up in the demand for hardwoods during the past month. With the volume of trade at its highest peak of the year, the present problem seems to be that of securing sufficient stocks to meet the demand. It is a scramble for what stocks are available on the part of customers in evident disregard of prices. All thought of lumber in plenty for coming months' requirements have passed.

The excessive rainfall in various sections of the country, particularly the Southern States, has practically put a stop to all logging. Rainfall at Memphis and in Arkansas, Louisiana, and Texas, also in Mississippi, during the months of October and November was the greatest within the history of the Weather

Bureau. The woods are full of water, roads are impassable, and while the mills are now manufacturing what logs they have on hand, it is predicted that a general curtailment of operations will be imperative by the first of the year and that there is little prospect of being able to replenish the supply of logs to any extent until spring. Conditions caused by the rains will not be felt to the fullest extent until after January 1.

Hardwood stocks are pretty well cleaned up. The supply at mills of unsold stocks probably not exceeding 25 per cent of normal with production averaging about 65 per cent of normal. (R., Vol. II, pp. 1091, 1092.)

No letter for a subsequent date appears in the record.

MEETINGS.

There were 47 meetings held by the association, at times and places as follows:

	Cincinnati.	Memphis.	Jackson.	New Orleans.	Shreveport.	Alexandria.	Little Rock.	Beaumont.	Houston.
January, 1919	21st	.....	.....	.....	.....	.....	.....	.....	.....
February, 1919	11th	.....	.....	24th	.....	.....	.....	.....	.....
March, 1919	11th	7th	.....	.....	.....	19th	.....	.....	.....
April, 1919	5th	11th	18th	15th	.....	.....	.....	.....	.....
May, 1919	13th	8th	23rd	.....	21st	.....	27th	.....	.....
June, 1919	10th	13th	12th	.....	.....	.....	.....	.....	.....
July, 1919	8th	11th	18th	.....	.....	.....	22nd	.....	16th
August, 1919	12th	8th	15th	.....	.....	.....	27th	20th	.....
September, 1919	28th	12th	19th	17th	.....	.....	24th	.....	.....
October, 1919	7th	10th	17th	.....	15th	.....	.....	.....	.....
November, 1919	11th	14th	.....	.....	.....	.....	26th	.....	.....
December, 1919	.....	.....	.....	.....	.....	.....	.....	.....	.....
January, 1920	13th	.....	.....	8th	.....	.....	10th	.....	.....
February, 1920	20th	17th	.....	12th	.....	.....	19th	.....	.....

The minutes of the meetings purport to contain a synopsis of the discussions had; and their character may be judged from the following quotations taken from the minutes:

Meeting of January 21, 1919, at Cincinnati (R., Vol. I, pp. 92, 93, 94):

> Mr. Robinson said: * * * If there is no increase in production, particularly in oak, there is going to be good business, but did not believe sawmill men would make much money this year. Nothing in sight to make sawmill men get busy. Lots of firms are going to have hard sledding. If we commence to have business failures, we are going to have hard times. Believe hardwood industry has brightest future of any industry, but do not think any industry has much to look forward to. The cost of living must first be adjusted. Cost of production is near selling price. Oak has gone up less than almost anything else. Believe No. 2 common and better oak will go higher—it will have to to let us live. First and seconds oak sold for $60 in 1914—now selling for $70. That is not much advance. The same condition exists in No. 1 common. The lower grades went up, and if they had not, our cost would have exceeded our selling price. I do not believe the lower grades will hold up, and that is where we have been making our money. I think there will be a good volume of building, but no man is safe in increasing his production. If he does, he will be in bad shape, as the demand won't come. Mr. Schwab says that Europe will rebuild with

stone instead of wood. Mr. Hoover says that the cost of food will increase—if so, labor can not come down.

* * * * *

Mr. Robinson stated that the new grading rules would be promulgated about February 1. He referred to the effort to get these rules into the hands of the consumers, and stated that a special committee had been appointed to have charge of this work. The association will endeavor to put a copy of the rules in the hands of all consumers, and will advertise the rules so that they may become generally well known. This will cost considerable money, and as the assessment for general expense is not sufficient to take care of this, an effort is being made to get the special woods departments to give up a part of their assessment for the purpose of advertising the rules. * * *

Meeting of February 11, 1919, at Cincinnati (R., Vol. I, p. 96):

Mr. Gearhart: "Quartered oak is very active. We have sold some stock that we have had on hand over a year at the following prices:

4/4" Fas	$102.00
Common and select	80.00
5/4" Fas	115.00
Common and select	.85

"These prices are all f. o. b. cars. We have sold all of our No. 2 common, and at a respectable price. The demand for Fas. poplar was never better; 4/4" No. 2 common is slow. The demand for 5/4" and 6/4", however, is good. Poplar squares are in good demand."

Mr. Barr: "The outlook is good and we have taken some orders. We have raised our price on plain white oak $2 to $3. There are some very cheap prices being made on gum. Talked with a furniture man and he told me he thought oak would go up, in fact it must go up. I believe No. 3 common will come down. We are receiving lots of inquiries for quartered white oak. We have sold Fas. at $75 f. o. b. mill."

Mr. Hutchinson: "The first two weeks in January looked very blue—the latter part of January and up so far this month, very good—in fact, I have called a halt on accepting any further orders at present. My production is down to 40 per cent. We are having no business in wormy chestnut, No. 2 common oak, and are long on Fas. red. We are sold up on white oak. Our business is largely confined to railroads, mines, etc."

Meeting of February 24, 1919, at New Orleans (R., Vol. I, p. 100):

Mr. Brewer stated that it looked as if the wholesalers had taken on a lot of business at any old price and cleaned up the small manufacturers of their stocks. He had found his inquiries to have increased heavily during the past week.

Mr. Bohlssen said he found that the Texas box manufacturers were buying heavily and offering $20 at the mill.

Mr. Smith said that it looked as if No. 3 oak was going to be a bad seller.

Mr. Cleveland, who had just made a swing around the buying circle, said that he found manufacturers well stocked and most of them hampered because of the failure of the Government to effect settlements on contracts. He looked for a heavy demand for No. 2 gum. Stated he was holding sap gum for $37 at mill.

Mr. Adams stated that his mill had been shut down since last November because of weather conditions and had a little over two million feet of stocks on hand. He said that Louisiana had experienced a 30-inch rainfall in 90 days, and of course there was no production.

Mr. L. C. Cornelius, of St. Louis, who was present, said he found furniture factories buying better. He was asking $50 for his ash, but manufacturers were quoting $45 to $47. Believed there would be a better demand for red gum. The demand for box material was off. This was due to packers' production being reduced as a result of the armistice. Looked for an average price on No. 1 and No. 2 gum, and better prices on Fas. sap. Ash stocks very low.

Mr. Stanford said he had more timber orders on hand at satisfactory prices than his mill could produce.

Meeting March 7, 1919, at Memphis (R., Vol. I, pp. 102, 103):

This was the first of a series of sectional meetings to be held by the American Hardwood Manufacturers' Association in the Memphis territory.

The open competition plan and the new inspection rules and sales code furnished the chief topics for discussion at the meeting.

Mr. Carrier stated that he had at first been an opponent of the plan and an advocate of the old American plan, but that he had become a loyal convert and was now enthusiastic about the plan.

Mr. Gadd stated that the plan was inaugurated on March 1, 1917, by the Hardwood Manufacturers' Association. It began with 35 members. It had 97 members when the associations were consolidated, 35 of these being in the southern territory; that the plan now consisted of 152 members, with new members being added daily. The plan covers all kinds of hardwoods and cypress.

Mr. J. M. Pritchard, secretary-manager of the association, made a statement in reference to the plan of the Department of Commerce to induce the stabilization of prices. He stated that while there was at present a hesitancy on the part of the building industry to resume operations, there existed the greatest potential demand for building in the history of the country, and that when building did resume, which it was bound to do, it would mean great prosperity for the lumber industry.

This same statement was made by Mr. Gadd, who explained that basic commodities other than lumber, steel for instance, had experienced a war-time advance of 200 per cent, upon the basis of 100 per cent advance in labor costs, which was the average wage increase in the various basic commodity industries, in-

cluding lumber; while the war-time advance in the price of lumber has only amounted to some 50 per cent.

Meeting of March 11, 1919, at Cincinnati (R., Vol. I, p. 105):

> Mr. Pryor stated that he had been out for two weeks calling on the yard people and had been getting some nice orders. Could have gotten more if he had the lumber. Buying had not really begun. That the retail yard trade looks good. He stated that they want poplar and other kinds of wood that they were out of. That they realize that stocks are low. As regards the export trade, the latest development is an increase in freight rate of 50 cents, due to the increased demand for space.

Meeting of March 19, 1919, at Alexandria, La. (R., Vol. I, p. 108):

> Production report showed that the southwestern territory only produced 43 per cent of the normal production during February. It was stated that this was caused by logging conditions being very bad, and many mills were shut down on account of having no logs on hand. The report for the same period in the eastern territory showed a production of 73 per cent of normal, and in the Memphis territory 45 per cent.
>
> Collections were reported to be satisfactory.
>
> The car supply was also reported to be satisfactory.
>
> A discussion regarding the general outlook for future business brought out the fact that all of the members were optimistic regarding

the future and that the outlook was very encouraging, that general conditions were improving daily, with good prospects for a heavy export demand.

Meeting of April 5, 1919, at Cincinnati (R., Vol. I, p. 110):

Mr. Dulweber stated that he believed that conditions were much improved. That at the January furniture show buyers were holding back and trying to bear down prices. He had been given to understand that since the show the furniture people had increased production. His best information is that they have very small stocks of lumber on hand. He stated that he believed if the price had been maintained that more lumber would have been sold. He said that stocks were low in the South and that we were going to wake up some morning and find that we were entirely out of a considerable number of items.

Mr. Thompson stated that business was very much improved. He thought this was brought about by the export demand, as the domestic trade had been a little disappointing. The export rate and space proposition is holding back export demand.

Mr. Worcester stated that he was a manufacturer of northern hardwoods and shipped lumber in car lots and cargoes; that his shipments in January and February dropped off. There was a little improvement in March. During the latter part of March business began to pick up, and that during the past week he had sold more lumber than had been sold in any month since January. The demand is

coming from manufacturing concerns who are anticipating their needs. He said: "We have sold all the ash that we will produce during the year to one concern at the association list. In maple we sold one million feet yesterday. Customer wanted one and a half million feet, but we could not let him have it. He will not get this lumber until September—there is no question about price. We sold another million or two to other concerns, which they will get throughout the year. These orders are from the shrewdest buyers we have. The retail yard demand is now picking up. As soon as the public get it into their heads that building materials can not be sold any cheaper a boom is going to come. Chicago needs a large amount of construction in both residential and manufacturing districts."

Meeting of April 11, 1919, at Memphis (R., Vol. I, . 114, 115):

Mr. Stark stated that the real business before the meeting was the open competition plan; that it was a success in other territories and was going to be here, so why not get into it.

Mr. Hemphill felt that the 54 per cent production during the next 60 days would have its effect. That high-grade cypress was moving at better prices than ever.

A number of members reported that they were running from 50 to 75 per cent of normal production.

Mr. Stark stated that the mills depending upon the railroads for their log supply would

be short of logs for the next 60 days. That he expected to see a gradual growth in business and that he felt that we would miss the usual depression that comes during the summer months.

Meeting of April 16, 1919, at New Orleans (R., Vol. I, p. 117):

> In answer to question No 5, the 19 members reporting have a normal production of 18,400,000 feet. Production for the month of March was 9,625,000 feet, or 52 per cent of normal, with the estimated production for the next 60 days 64 per cent of normal.
>
> In answer to question No. 6, the normal stocks of the 19 members reporting total 87,700,000, with present stocks on hand 52,300,000 feet, or 60 per cent of normal. This is a reduction of 15 per cent over the previous month.
>
> * * * * *
>
> In answer to question No. 10, all of the replies were short and to the point and positive that the outlook for future business was bright.
>
> Mr. Carrier, president of the association, arrived during the meeting and when called upon stated that meetings such as are being held in the southwestern territory are of the greatest possible help to the industry.

It will be observed that the discussions at this meeting largely followed the subjects inquired about in the questionnaire; and this was more or less true of the discussions in all the subsequent meetings.

Meeting of April 18, 1919, at Jackson (R., Vol. I, pp. 118, 119):

> Mr. Gadd stated that it was the desire of the association to hold sectional meetings at points convenient for all members to attend; that these meetings were already being held at Cincinnati, Memphis, and in the southwestern territory; that if sufficient interest was manifested the association would be glad to hold a meeting in the Jackson territory monthly hereafter. He told of the manner in which these meetings had contributed to the success of the open competition plan and other association activities. Mr. Gadd introduced Mr. J. B. Robinson, chairman of the southwestern territory, and asked Mr. Robinson to take charge of the meeting as temporary chairman.
>
> Mr. Robinson, on taking the chair, told of the benefits that had been obtained through the holding of monthly meetings in the southwestern territory and urged the members present to consider the advisability of holding meetings thereafter in Jackson or some convenient point.
>
> A very interesting discussion followed on market conditions in the Jackson territory. It indicated that inquiries were plentiful and that the market had a much firmer tone than 30 days ago.
>
> The motion was made and passed that meetings be held monthly hereafter at Jackson, Mississippi, on the third Friday of each month.

Meeting of May 8, 1919, at Memphis (R., Vol. I, p. 120):

> Mr. Muse stated the purpose of the dimension department for the benefit of those present. He said that the object of the association is to benefit our business.
>
> The question of admitting members owning or financing mills and using the product of such mills in their own consumption was discussed.
>
> Mr. Brown thought it would be detrimental if such class of manufacturers would be permitted to join the association.
>
> Mr. Lynch thought it a good idea to have them in the association—they get all of the information anyway.
>
> Mr. Turner agreed with Mr. Lynch.
>
> Mr. Green told of his experience with the jobber having a little office in Chicago. He plays the consumer against the manufacturer. He thought it should be the object of the association to put the manufacturer in closer touch with the consumer.
>
> Mr. Pritchard told of the Rotary Cut Box Association provision requiring the manufacturer to sell at least 25 per cent of his product on the open market.
>
> Mr. Thomas stated that the broker is essential to the dimension manufacturer. That there are three classes of dimension manufacturers. One who are a benefit to the industry because they know the value of their product. Another class, who would be as good if they knew how—they would be very glad to ask the right kind of price for their product if they

knew what it was. And another class, which is a drag to the industry. They never could be lifted up where they would be a benefit. Mr. Thomas stated that he hoped to see the day come when the dimension industry would get on a better plane; that if price is not up to cast, the industry can not go ahead.

Mr. Brown brought up the question of reporting dimension sales in the lumber report.

Mr. Turner thought they ought to be together, because the dimension manufacturer ought to get as good prices for his product as the sawmill men get for their lumber product.

Mr. Muse stated that it was up to the dimension manufacturer to convince the consumer that the dimension stock is worth as much, or more, than lumber. That in manufacturing dimension stock waste is eliminated, the forest conserved, and the consumer gets absolutely clear stock.

Mr. Thomas stated that it was to the interest of the sawmill men to see that dimension men got the highest prices possible for their product, and that it was to the interest of the dimension men to see that the sawmill men sold their lumber at the highest prices obtainable.

A report showing the sales of dimension stocks during the past 60 days was passed around and item by item discussed.

Meeting of May 9, 1919, at Memphis (R., Vol. I, pp. 122, 123):

Copies of the monthly market condition report were distributed and a discussion followed.

The consensus of opinion was that inquiries were better by 50 per cent, and that the inquiries were coming largely from wholesalers. Stocks on hand at furniture factories are reported to be very low; they have not bought anything for several months, but should be in the market shortly. It was stated that retail stores are continually receiving advice to advance prices on furniture. Furniture factories apparently are having more business than they can do this year and are not guaranteeing any shipments before September 1. Building is starting up on a big scale. One member referred to the fact that in New York they had organized a protective association to protect themselves from the landlords.

It was stated that the recent heavy rains would probably bring down the estimated 64 per cent of normal production during the next 60 days. That the recent rain had set back logging operations at least two weeks.

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Reference was made to members who contemplate running day and night, and it was stated that the lumber industry had seen these unusual market conditions before and that we ought to be very sure that the market is capable of taking care of night and day lumber.

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Mr. R. L. Muse told of conditions in the dimension stock industry. He stated that it was to the interest of the dimension manufacturers to see that sawmill men got fair values for their product, and that it was to the

interest of the sawmill men to see that dimension manufacturers also got attractive prices for their product.

Meeting of May 13, 1919, at Cincinnati (R., Vol. I, pp. 125, 127):

Mr. Robinson, in opening the meeting, referred to the difference between Cairo and Cincinnati prices on No. 1 and No. 2 common oak. The natural differential in price between these two points should not exceed $3 or $4, while there is at the present time and has continued for some time past, an average price at Cincinnati $8 to $9 higher than the average price at Cairo. He did not understand why, on a market like we are having to-day, the southern manufacturer could not get closer to the Cincinnati prices on these grades.

A discussion of market conditions followed.

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In answer to question No. 10, in regard to the general outlook for business, it was stated that furniture factories had a lot of stock on hand, but that it was of a kind that does not meet their requirements. Truck manufacturers and implement plants are in the same condition. The interior trim factories have no stocks, and if building continues to improve, they must come into the market immediately. Some of the box factories are reported to be running 50 per cent, but are using lots of cheap substitutes. It seems to be the general opinion that building is going ahead regardless of price and shortage of stocks. Labor and hardware are contributing to the

high cost of building more than lumber. The price of furniture is advancing, and dealers in furniture are daily receiving notice to advance prices. Furniture factories are sold up to September and October deliveries. There never was so much activity in musical instrument plants.

It was stated that the outlook for beech and maple was good—6/4 and 8/4 maple much stronger—1½" and 2" beech in better demand. One member stated that No. 2 common poplar was slow. Another member stated that he did not find it so, but that No. 3 common poplar was slow with him.

It was stated that if shipping space was available for exports, there would very soon be a famine of No. 1 common and better oak.

Mr. Barr, and other members, spoke of the benefits they had received through the open competition plan.

Meeting of May 21, 1919, at Shreveport (R., Vol. I, pp. 128–130):

Mr. Patterson stated that his firm was long on No. 2 boxing cypress that they had held for a price. They found that they could not move the stock, and cut the price $2—sold over one-half million feet in five carload lots—and had raised the price $1 and continued to receive orders.

Mr. Ryan stated that he could sell anything he had—including odds and ends—at any price.

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Mr. Gadd reported that five or six additional boats had been sent to the Gulf ports for loading lumber. He stated that some Memphis mills were getting ready to run night and day. These are large river mills, who have logs that will spoil if they are not cut up rapidly.

Mr. Patterson stated that in his opinion it was suicidal to run mills night and day; that the pine mills had done it, but that he hoped they would profit by their past experience and not do it this year.

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Production in the southwestern territory during the month of April was 60 per cent of normal, as compared with 52 per cent for the month of March. The estimated production for May and June was 78 per cent. The production for the month of April for the combined hardwood territory was 60 per cent of normal, and the estimated production for the combined territory for the months of May and June was 73 per cent.

The stocks in the southwestern territory were reported to be 57 per cent of normal on May 1, as compared with 60 per cent of normal on April 1. Stocks in the combined territory on May 1 were 70 per cent of normal, as compared with 82 per cent on April 1.

Meeting of May 23, 1919, at Jackson (R., Vol. I, pp. 131, 133):

Mr. Faust, in calling the meeting to order, stated that the purpose of these meetings was to bring the manufacturers together with the view that they might get acquainted and re-

ceive the benefits, through associated effort, that they are entitled to.

A discussion of market conditions followed.

In answer to question No. 1 it was the opinion of the members present that the inquiries were better by 20 per cent or more during the past 30 days and that during the past 10 days were fully 25 per cent better than at the time the market condition report was made up.

Mr. Faust stated that his mill was running every day but that he only had five cars of lumber to sell.

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Question No. 5 developed that during the month of April there was 71 per cent of normal production in the Jackson territory, with an estimated production for May and June of 77 per cent, but owing to the excessive rainfall and other conditions it was the general opinion that this estimate was too high.

Question No. 6 showed stocks in the Jackson territory to be 60 per cent of normal, as compared with 70 per cent of normal in the combined hardwood field.

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The following interesting summary of market conditions, prepared by Mr. Zink, was read:

OUR OPINION OF MARKET CONDITIONS.

First. It would appear that the export demand is going to become excessive as soon as obstacles are eliminated—the present abnormal freight rates and lack of shipping facilities.

Second. The railroads can not remain out of the market much longer and their demands are going to be very great once a definite buying policy has been determined upon; and, with the price fixing board out of existence, Director General Hines seems to have about made up his mind to call for bids.

Third. The car shortage always brings with it difficulties in the prompt movement of lumber, and, with railroad equipment in as poor condition as it is to-day, quick shipments of lumber are going to be next to impossible when crops commence to move.

Fourth. Building operations all over the country are drawing heavily on stocks of lumber on hand; the furniture and musical instrument trade must become more and more active as the country gets back on a peace basis; there is an ever-growing demand for agricultural implements and vehicles of all kinds, and the automobile and truck industries are showing a decided increase in production.

To our mind all of the above activities are bound to accelerate the movement of lumber, and in our way of thinking an increase in selling costs is inevitable, especially when it is considered that the price of lumber has not increased in proportion to the cost of production and decreased efficiency of labor. * * *

Meeting of May 27, 1919, at Little Rock (R., Vol. I, pp. 135, 137):

Mr. Robinson, in taking the chair, told the members present what the open competition meetings had done for the members in the

southwestern territory. He said that he saw no reason why a large and well attended meeting could not be held in Little Rock monthly. That members come to these meetings and come again, and that after they once come they do not miss many meetings. That the more we can do to organize industry, the better it will be. That the association would prepare special market condition reports for these meetings, showing the conditions actually existing in that particular territory.

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Mr. Fee asked the question as to what grade of pine would compare with No. 1 common gum. Mr. Buchner replied, "No. 1 common pine." Mr. Robinson said that No. 1 common and C pine was about equal to No. 1 common and select gum. Mr. Fee said that on a market bringing $30 at Cairo, or $24 at the mill, for No. 1 common gum, as compared with the price of $36 for No. 1 pine, would it not pay the manufacturers to hold their stocks? Some discussion followed as to the possibility of holding stocks.

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Mr. Fee stated that he was not a member of the open competition plan, but that he thought that it was a good thing and would come to every meeting. He said that 90 per cent of his lumber was for export, and that it was almost impossible for him to make the reports required by the association.

Mr. Allport stated that the open competition plan had become invaluable to him.

Mr. Robinson explained the value of these meetings to the man who makes only a little of any particular wood. Members receiving the open competition sales reports are not compelled to sacrifice stocks which they do not handle regularly. The members have before them prices made on this class of stocks by those who handle it in large quantities.

Meeting of June 10, 1919, at Cincinnati (R., Vol. I, pp. 138–141):

In answer to question No. 1, it seemed to be the general opinion that the market was very active, with more live inquiries and orders—with an increased demand from all classes of customers except box factories. The export demand continues strong, with an increasing amount of space available. It was stated that the demand for box lumber was better. That No. 3 common poplar was worth $3 to $5 more than 30 days ago. That there was a heavy demand for sound wormy chestnut at firm prices. Reference was made to the spread in prices at Cairo and Cincinnati for common oak. Some discussion followed as to the quality of southern oak as compared with eastern oak. It was stated that eastern and northern furniture factories do not like southern oak. Eastern mills, however, were buying it for export.

In answer to question No. 2 it was the opinion that measuring by the number and character of live inquiries they were 30 to 50 per cent better during the past 30 days as compared with the previous 30 days.

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Mr. Robinson stated that he did not think a manufacturer should buy timber thinking that present conditions would continue. That the next six months will see more lumber produced than during any other period. Flooring plants are running up to capacity. He said that he had been offered an order for switch ties at $1 advance. Speaking about the inspection on switch ties, he said that the grading is spotted—one inspector will be good and the next one bad. He said that the list was $34 and that he had been offered an order at $35; that sound, square-edge oak was not so good.

Mr. Dabolt stated that he had received an order for switch ties at $36 a day or two ago.

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Mr. Horton stated that he was getting $36 for M. C. R. R. delivery.

Mr. Hart stated that if a man is persistent he naturally gets more orders than the man who waits for the orders to come to him.

Mr. Gearhart stated that he had had no orders for car oak for some time.

Mr. Brewster stated that the last price on the B. & O. was $42.

Some members present thought that car oak ought to bring better prices than switch ties.

* * * * *

Mr. Nigh asked the question as to how much higher log-run values are at the present time than they were at the high peak last year.

Mr. Robinson said "Not over $3 or $4."

Mr. Horton stated that his had not gone up any.

Mr. McCall thought there was some little increase.

The answers to question No. 5 indicated that the production during the month of May was 74 per cent of normal as compared with 72 per cent for the month of April, with an estimated production of 77 per cent for the months of June and July. It was stated that the hemlock production will materially curtail the production of hardwoods.

In answer to question No. 6 the reports indicate that the stocks on hand in the eastern territory on June 1 were 80 per cent of normal as compared with 89 per cent on May 1—a decrease during the month of May of 9 per cent.

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In answer to question No. 10 members apparently are having more business offered them than they can take care of, with prospects good for the continuation of this situation for the balance of the year.

Meeting of June 12, 1919, at Jackson (R., Vol. I, pp. 141, 142):

It was the opinion of the members present that the market is extremely active. Both domestic and export demands continue to increase, and wholesalers are buying actively at higher prices. It seems that it is hard for the consumer to realize that we are on a new price level and believe it is the duty of the manufacturer to preach the gospel that the

price of lumber is not high. The average log run value to the millman is little higher to-day than it was at the time the armistice was signed. The upper grades are higher, it is true, but the lower grades are pulling down the average. Certain items of stock are expected to go still higher.

Inquiries are generally better by about 50 per cent during the past 30 days, as compared with the preceding month. In some instances members are reporting an improvement of 100 per cent.

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The per cent of normal production in the Jackson territory for the month of May was 62 per cent of normal, as compared with 71 per cent during the month of April, with an estimated production of 79 per cent of normal for the months of June and July.

The stocks in the Jackson territory were reported as 56 per cent of normal on June 1, as compared with 60 per cent on May 1.

Meeting of June 13, 1919, at Memphis (R., Vol. I, pp. 144, 145):

It was the consensus of opinion that conditions during the past 15 days had improved greatly over the previous 15 days, caused, apparently, by a realization of the actual shortage of stocks and the probability that production will be further retarded by unfavorable weather conditions.

Replies to question No. 2 indicated that inquiries are better by probably 50 per cent

during the past 30 days, as compared with the preceding month.

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Production in the Memphis territory during the month of May was 66 per cent of normal, as compared with 59 per cent in April. The estimated production for June and July was 73 per cent of normal.

Stocks on hand in the Memphis territory were 75 per cent of normal on June 1, as compared with 63 per cent of normal on May 1.

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In discussing the general outlook for business, Mr. Jurden stated that if weather conditions permitted normal logging operations in June and July we would have a lot of lumber on hand by October 1. He believes, however, that we have not as yet seen the top of the market.

Mr. Norman stated that he anticipated a large demand and felt that there was no chance for a break in the market for several months to come. Lumber manufactured this summer will be sold before it is dry.

Mr. Anderson stated that in his opinion conditions were going to continue good. The demand is good and the supply short. Every one seems to want lumber.

Mr. Jurden: "The stabilized market is a good thing—to-day nobody knows what the price is. We can not agree on prices while the market is in the shape it is to-day. I move that we hold these meetings weekly. I believe that it will go a long way toward keeping the market stable."

A motion was made and carried that meetings in the Memphis territory be held weekly hereafter.

Meeting of June 24, 1919, at Little Rock (R., Vol. I, pp. 146, 147):

It was the consensus of opinion that market conditions were very much better during the past 15 days as compared with the preceding 15 days. The demand for the lower grades was reported as much better, owing to a shortage of No. 1 common and better stock.

Inquiries were better by 30 to 50 per cent as compared with the preceding month, and this ratio was being sustained during the month of June.

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Mr. Allport stated that the wagon people would not pay within $10 to $15 for dimension stock of the price they were paying for lumber. They were reported as having paid $85 for poles and $75 for reaches f. o. b. the mill.

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Mr. Allport stated that with the present price of lumber poles ought to bring at least $100, and in fact that dimension ought to bring $20 more than lumber.

The report indicated that it would take an average of 24 days to ship out the total orders on hand, as against an average of 22 days for the previous month.

The report indicated that there was a 78 per cent of normal production in the Little Rock territory for the month of May as against 82 per cent for the month of April. The

anticipated production for June and July was 76 per cent, but the members did not believe that this estimate would hold out, owing to weather conditions that had continued bad since June 1.

The report indicated a 52 per cent of normal stock in the Little Rock territory on June 1, as against 58 per cent on May 1.

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The general outlook for business is very good. Unfavorable weather has interfered with production, while the demand continues to be heavy. A great deal of building is starting all over the country. Flooring plants are running night and day and are sold up for several months ahead. They are reported to be cutting No. 2 and No. 3 common oak.

In the general discussion that followed, Mr. Thomas stated that in his opinion the only salvation for the dimension industry was collective selling—that dimension men invariably make their prices low, through ignorance of market conditions.

Meeting of July 8, 1919, at Cincinnati (R., Vol. I, pp. 149, 150):

Replies to question No. 3 indicate that it would take about 40 days to ship out the total orders on hand, working under normal conditions and assuming that all orders are ready for shipment. The average for the previous month was 32 days.

During the month of June production in the eastern territory was 68 per cent of normal, as compared with 74 per cent in May. The esti-

mated production for July and August is 78 per cent of normal.

Stocks in the eastern territory on July 1 were 70 per cent of normal, as compared with 80 per cent on June 1.

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As to the future outlook, reports indicate a continued good market for the next few months. The effect of increased building activities is apparent.

Mr. Korn stated that in the South they had had seven months' rainfall. This had retarded production very materially, and he did not expect the mills to be running 100 per cent before September 1.

Mr. Hopkins stated that the eastern mills could not run 100 per cent, on account of inability to get labor.

Mr. Mayhew stated that when the armistice was signed everyone thought prices would decrease. Members did not endeavor to get a heavy production. Eastern mills are starting up now, but the production at southern mills is still behind on account of weather conditions. In his opinion, mills could not accumulate large stocks before March 1, 1920. The average selling prices of the W. M. Ritter Lumber Company for the month of May were lower than the day the armistice was signed. Anyone who tells you they were higher is just picking out a few items that have had an abnormal advance. If you will compare costs now with 1911 to 1914, you will find that you are making less money in dollars and cents than then. You must not forget that your

cost has doubled—not your monthly cost, but your annual average cost. In other words, the cost is higher and the selling price no greater.

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Mr. Pryor said that if anyone could regulate the price situation it would be the best thing that could happen. They had told their salesmen to stop selling, for the reason that they had nothing to sell. They are keeping their green stock off the list. The demand is far ahead of the supply. * * *

Mr. Hutchinson said: "If we stimulate production and advance prices, won't we soon have more lumber than we will require?"

Mr. Pryor: "Yes; but we have not reached that point yet. We will ship this month three million feet more than we cut, but hereafter we will not sell any more than we cut."

Mr. Hopkins: "With housing conditions short, and reconstruction going on all over the world, and the demand that is sure to come from the railroads, we see no reason why we should not have a continued good market into next year."

Mr. Hutchinson: "There is no use to make lumber if we can not market it. On July 1 the price of lumber was higher than it has ever been. The furniture people are demanding lumber at any price. Do not see how there can be a bad lumber market for the next two or three years. The selling price is still out of proportion to the cost."

Mr. Rubenstein, foreign representative for Mowbray & Robinson Company, stated that

immense quantities of lumber had been shipped to Europe. That every inch of storage ground was occupied. That ships were standing in the river for days before they could be unloaded. That very little of this lumber has gone into consumption, and that we might as well expect a decreased export trade for several months to come.

Mr. Hutchinson stated, as an example of the increased cost of labor, that the coal mines to-day are taking labor from the sawmills by paying $6.50 per day for common labor.

Meeting of July 11, 1919, at Memphis (R., Vol. I, p. 152):

It will take an average of 35 days to ship out total orders on hand. The average for last month was 40 days.

Production in the Memphis territory during the month of June was 65 per cent of normal, as compared with 66 per cent in May. The estimated production for July and August is 87 per cent.

On July 1 stocks in the Memphis territory were 63 per cent of normal, as compared with 59 per cent on June 1.

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It is the consensus of opinion that the market for hardwood lumber will continue strong for some months to come, and prices will be better within the next 30 to 60 days than they are now. The demand is heavy, in the face of frequent price advances. An increasing export trade and large volume of business due to more extensive building activities, together

with the delay in increasing production, are a combination of factors which are almost certain to assure satisfactory business for the balance of the calendar year. Until depleted stocks are again normal, and the stocks in retail and wholesale yards as well as manufacturers' stocks are normal, there must be good business. The fact that the consumer wants to contract for future delivery strengthens this belief.

Meeting of July 16, 1919, at Houston (R., Vol. I, pp. 153, 154):

It would take an average of 30 days to ship out the total orders on hand, working under normal conditions.

The production in the southwestern territory for the month of June was 55 per cent of normal, as compared with 58 per cent of normal during the month of May. The estimated production for July and August was 85 per cent of normal.

The stocks on hand at the southwestern mills on July 1 were 48 per cent of normal, as compared with 58 per cent of normal on June 1.

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As to market conditions for the next few months, there is nothing to indicate other than a continued strong market for some time to come. The recent price advance has apparently not affected the demand, and with the probable increased export demand and the increased volume of building operations there is sure to be a satisfactory market for the balance of the calendar year.

Meeting of July 18, 1919, at Jackson (R., Vol. I, p. 155):

> In answer to question No. 3, the summary indicates that it would take on an average of 33 days to ship out the total orders on hand, under normal conditions. This is comparative with an average of 38 days for the previous month.
>
> In answer to question No. 4, the summary indicates that the production from the Jackson territory was 67 per cent of normal for May. The estimated production for July and August is 85 per cent.
>
> In answer to question No. 5, the summary indicates that there was 54 per cent of normal stock on hand—this includes stock sold and unsold. It was stated that the summary for next month would show only unsold stocks on hand. This percentage compares with 56 per cent on hand June 1, indicating that stocks were still on the decline.
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> In answer to question No. 9, the reports indicated that so far as market conditions for the next few months are concerned, there is nothing to indicate other than a continued good business throughout the balance of the year. Frequent price advances have been accepted by the buying trade and the demand continues strong enough to take up practically every item in dry lumber that can be obtained.

Meeting of July 22, 1919, at Little Rock (R., Vol. I, pp. 156, 157):

> The replies to question No. 3 indicate that it would take an average of 19 days to ship

out the total orders on hand, working under normal conditions, as compared with 24 days for the previous month. Some of the members indicated that they would be very glad to contract ahead on present values; other members indicated that they were only keeping sold up on their dry lumber.

The production report indicates that during the month of June the mills in the Little Rock territory produced 50 per cent of normal, as compared with 78 per cent of normal in May, and that the anticipated production for the months of July and August would be 90 per cent of normal.

The stocks on hand were shown to be 42 per cent of normal, as compared with 54 per cent on June 1.

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It was the opinion of the members present that market conditions for the next few months would continue favorable, for the following reasons:

An assured export demand which will have to be supplied by American sawmills.

The prospect of continued heavy demand at home.

No probability of getting back to normal stocks for some time to come.

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Mr. J. B. Robinson called attention to the danger of high prices, and compared the costs to-day with those of 1917. If labor and supplies have doubled, and labor is below normal in efficiency, the price of lumber is not high.

Meeting of August 8, 1919, at Memphis (R., Vol. I, pp. 158, 159):

> It would take an average of 40 days to ship out the total orders on hand in the Memphis territory, as compared with 35 days for the previous month.
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> The production in the Memphis territory for the month of July was 76 per cent of normal, as compared with 65 per cent in the month of June. The estimated production for August and September is 109 per cent of normal.
>
> Unsold stocks in the Memphis territory on August 1 was 38 per cent of normal.
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> * * * * *
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> It is the prevailing opinion that the market will remain good for the next few months. The demand is still in excess of the supply and there is no probability of an immediate production great enough to catch up. Some apprehension is being expressed because of the unsettled labor situation and its possible effect on business in general. General business over the entire country and in all lines never has been better. Furniture dealers are taking orders with no guaranty of price or date of shipment. Inquiries are being received from factories for their requirements next winter, which would indicate that they are not looking for a lower market.

Meeting of August 12, 1919, at Cincinnati (R., Vol. I, pp. 160, 162):

> It would take an average of 33 days to ship out the total orders on hand, working under

normal conditions. The average for the previous month was 40 days.

Production in the eastern territory for the month of July was 74 per cent of normal, as compared with 68 per cent of normal for the month of June. The estimated production for August and September is 83 per cent. It was the consensus of opinion that production in the eastern territory would continue below normal. River mills are shut down, other mills can not get railroads built, and there is a shortage of cars.

Unsold stocks in the eastern territory on August 1 were 41 per cent of normal, as compared with 38 per cent of normal in the Memphis territory. It was suggested that another column be added to this report, showing the stocks sold as well as unsold, and that normal stocks are to be figured on the basis of four months' production.

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Mr. Stark referred to the President's address in one paragraph of which Mr. Wilson stated that the lumbermen had some form of concert and that was going to be corrected. He did not refer to what class of lumbermen, but we will probably hear something on this subject.

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The reports indicate a general feeling of confidence in the market for the next few months. It is thought that present prices will hold, or even go higher. Greatly diminished stocks and continued strong demand, the fact that lumber taken up is going into immediate consumption, and the probable antici-

pation of the buyers of an advance in freight rates, are assurance of a good business for the remaining months of the year.

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Mr. Mayhew: "I consider the stock report one of the most valuable reports published by our association, and I am only sorry that we are unable to get this report earlier, but it seems through the lack of cooperation on the part of a large number of our members, the publication of this report is delayed. We take this report when we get it and summarize comparisons. We find that stocks on hand in oak have decreased 80,000,000 feet since January 1, and that all hardwoods have decreased 213,-000,000 feet. The decrease would have been more had the same membership reported on January 1 as on July 1. Every member ought to take this report and study it."

Meeting of August 15, 1919, at Jackson (R., Vol. I, p. 164):

It would take an average of 27 days to ship out the total orders on hand, working under normal conditions, as compared with 33 days for the previous month.

Production in the Jackson territory for the month of July was 69 per cent of normal, as compared with 67 per cent during the month of June. The estimated production for the months of August and September is 84 per cent of normal, or equivalent to a little over two and a half months' production, indicating that mills are, as a rule, sold up on dry lumber.

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It is the prevailing opinion that the market will continue to be good for the next few months. The demand is still in excess of the supply, and there is no probability of an immediate production great enough to catch up. Excessive rainfall in some sections has interfered very materially with logging operations. Some apprehension is being expressed because of the unsettled labor conditions and its possible effect on business in general.

The following resolution was submitted and adopted:

"Whereas we think that now is the opportune time to take action to see that orders are so made that they will constitute a contract between the buyer and the seller; and

"Whereas the reports of the members of the American Hardwood Manufacturers' Association indicate that they are filling orders at from ten to sixty dollars under the market:

"*Be it resolved*, That an associated effort be made at this time, so that the members will be protected against cancellations should the market decline."

Meeting of August 20, 1919, at Beaumont (R., Vol. I, pp. 165, 166):

The summary of question No. 2 indicated that it would take an average of 28 days to ship out the total orders on hand, working under normal conditions, as compared with 30 days for the previous month.

The production in the southwestern territory for the month of July was 57 per cent of normal, as compared with 55 per cent of

normal for the month of June. The estimated production for the months of August and September was 86 per cent of normal.

The summary indicated that the unsold stocks in the southwestern territory were 36 per cent of normal.

* * * * *

The outlook for the next few months brought forth an interesting discussion. It was the consensus of opinion that the market will continue to be good for the next few months. The demand is still in excess of the supply, and there is no probability of an immediate production great enough to catch up. Some apprehension is being expressed because of the unsettled labor conditions and its possible effect on business in general.

Meeting of August 27, 1919, at Little Rock (R., Vol. I, pp. 167, 168):

The replies to question No. 2 would indicate that it would take an average of 24 days to ship out the total orders on hand, working under normal conditions, as compared with 19 days for the previous month. This increase would indicate that mills were satisfied to contract ahead at present prices.

Production in the Little Rock territory for the month of July was 76 per cent of normal, as compared with 50 per cent during the month of June. The summary indicated that the estimated production for the next 60 days would be 100 per cent, but the members present stated that this production could not be obtained.

Unsold stocks in the Little Rock territory on August 1 were 48 per cent of normal, or equivalent to less than 2 months' production, indicating that members, as a rule, were sold up on dry stocks.

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The replies to question No. 8 indicated that the market will continue good for the next few months. The demand is in excess of the supply, and there is no probability of an immediate production great enough to catch up. Remarks indicate that some items could well stand a reduction in price. That 12½ cents and 15 cents per foot for 1'' common quartered white oak, f. o. b. the mill, could not help but lead to substitution. It was stated that the stocks in the hands of consumers are not heavy, but inquiries are less, owing to unsatisfactory labor conditions.

Meeting of September 7, 1919, at Cincinnati (R., Vol. I, pp. 169–171):

The replies to question No. 2 indicated that it would take the mills on an average of 24 days to ship out the total orders on hand, as compared with 33 days for the previous month. Mills are evidently cleaning up old orders and hesitating about contracting very far ahead on the present market.

The production in the eastern territory for the month of August was reported to be 72 per cent of normal, as compared with 74 per cent during the month of July. The estimated production for September was 91 per cent of normal. The summary indicated

that in no month this year has the production exceeded the estimate.

Stocks on hand September 1, sold and unsold, were 77 per cent of normal, and the unsold stocks 49 per cent of normal, as compared with 41 per cent on August 1.

Mr. Mayhew called attention to the fact that the stock report was the most valuable report published by the association. This report contains information that is invaluable to all members, information that could not be purchased at any price except through the association, and information that explains why the price of lumber has advanced. He asked every member present to cooperate in this important phase of the association activities, and to pledge themselves to make the reports promptly hereafter in order that the association might be able to place the report in the hands of the members earlier in the month.

A standing vote was then taken, which was unanimous.

Mr. Babcock stated that it would have very much to do with getting better prices if members could know actual stocks on hand as quickly as possible. He referred to the habit some of the members get into of taking orders for the higher grades and neglecting the lower grades; that any abnormal stocks that do exist are our own fault, and we should encourage our customers to use the lower grades when other grades are not available.

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The replies to question No. 8 indicate that market conditions are expected to be good, or better than ever, during the balance of the year.

Mr. Mowbray stated that he had changed his mind about the market, as within the past two weeks he had been getting a lot of orders at the top market prices. He had thought that the demand would fall off when the export demand stopped, but the domestic demand seems to be taking up all the slack.

Meeting of September 12, 1919, at Memphis (R., Vol. I, pp. 175, 176):

Replies to question No. 2 indicated that it would take an average of 37 days to ship out the total orders on hand, working under normal conditions, as compared with 40 days for the previous month.

Replies to question No. 3 indicated that the mills in the Memphis territory secured an 80 per cent of normal production during the month of August, as compared with 76 per cent for the month of July. The estimated production for the months of September and October is 85 per cent of normal.

Replies to question No. 4 indicated that the mills in the Memphis territory had on hand unsold stocks equivalent to 37 per cent of normal. Some of the members expressed the opinion that the stocks on hand unsold were largely stocks that the mills did not want to sell. Some of it was green stock, and one particular statement was made with reference to 2″ oak. It will be apparent

that the stocks on hand unsold are equivalent to about one and a half months' production.

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Replies to question 8 indicated that there was but little exception to the general opinion that market conditions for the next few months will remain satisfactory. A continued strong demand is assured by the fact that consumers are crowded with business, building operations are increasing, and indications here and there are that the export business is showing signs of improvement and there is every probability of good business for the next few months.

Meeting of September 17, 1919, at New Orleans (R., Vol. I, pp. 177, 178):

In reply to question No. 2 the summary indicated that it would take an average of 24 days to ship out the total orders on hand, working under normal conditions, as compared with 28 days for the previous month.

The replies to question No. 3 indicated that the mills in the southwestern territory had a 58 per cent of normal production during the month of August, as compared with 57 per cent during the month of July. The estimated production for the months of September and October was 69 per cent of normal.

The replies to question No. 4 indicated that mills in the southwestern territory were carrying total stocks, sold and unsold, equivalent to 50 per cent of normal stocks, and the percentage of unsold stocks to normal stocks

was 28 per cent as compared with 37 per cent in the Memphis territory and 44 per cent in the eastern territory.

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Replies to question No. 8 indicated that there is but little exception to the general opinion that market conditions for the next few months will remain satisfactory. The seasonable dullness may temporarily slow up business in a small degree, but with the continued strong demand from the furniture factories, with building operations increasing all over the country, there is every probability of good business for the next few months at least, with present values maintained.

Meeting of September 19, 1919, at Jackson (R., Vol. I, pp. 179, 180):

Replies to question No. 2 indicated that it would take an average of 21 days to ship out the total orders on hand, working under normal conditions, as compared with 27 days for the previous month. This condition indicates that mills are sold up on dry lumber.

Replies to question No. 3 indicated that the mills in the Jackson territory had a production during the month of August equivalent to 65 per cent of normal as compared with 69 per cent during the month of July. The estimated production for September and October was 71 per cent of normal. The discussion which followed, however, indicated that this estimated production would not be obtained.

Replies to question No. 4 indicated that the mills in the Jackson territory had a stock at

present, sold and unsold, equivalent to 62 per cent of normal and that the percentage of unsold stocks to normal was 42 per cent as compared with 37 per cent in the Memphis territory, 44 per cent in the eastern territory, and 28 per cent of normal in the southwestern territory.

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Replies to question No. 8 indicate that aside from a seasonable dullness reported by some that the market is expected to remain good for the rest of the year.

Meeting of September 24, 1919, at Little Rock (R., Vol. I, pp. 181, 182):

Replies to question No. 2 indicated that it would take the mills in the Little Rock territory an average of 27 days to ship out the total orders on hand as compared with 21 days for the previous month. Mills seemingly are satisfied that prices have reached the peak and are willing to take on contracts. Another explanation of the increase over the previous month is on account of the car shortage.

Replies to question No. 3 indicated that the mills in the Little Rock territory had 103 per cent of normal production for the month of August as compared with 76 per cent of normal during the month of July. The estimated production for September and October was 104 per cent of normal.

The production in the Memphis territory during August was 80 per cent of normal, in the southwestern territory 58 per cent of normal, in the Jackson territory 65 per cent, and in the eastern territory 76 per cent. Owing to

good weather conditions, the Little Rock territory has the greatest percentage of production.

The replies to question No. 4 indicated that the mills in the Little Rock territory had a 69 per cent of normal stock on hand sold and unsold and 47 per cent of normal stock unsold. This compares with 37 per cent in the Memphis territory, 28 per cent in the southwestern territory, 42 per cent in the Jackson territory, and 28 per cent in the eastern territory. In none of the territories does the unsold stock on hand represent more than a two months' production of the mills.

Meeting of October 7, 1919, at Cincinnati (R., Vol. I, pp. 184, 185):

Replies to question No. 2 indicated that it would take an average of 26 days to ship out the total orders on hand, working under normal conditions, as compared with 33 days for the previous month, indicating that shipments were getting closer to orders.

Replies to question No. 3 indicated that the mills in the eastern territory had an 85 per cent of normal production for the month of September, and an increase of 13 per cent over the month of August. This was the biggest increase in any month so far this year. The estimated production for the months of October and November was 87 per cent of normal.

Replies to question No. 4 indicated that the mills in the eastern territory had on hand at the present time unsold stocks equivalent to 44 per cent of normal stocks, as compared with 39 per cent for the previous month.

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Replies to question No. 8 indicated that dry lumber is scarce, the demand good, building good, car repairs to be done, coal mining improving, and the prospect of a revival of the export trade are the reasons given for a predicted good business for the next few months. The probable effect of the strikes is the only disturbing factor. There are a few reports of a let-up in inquiries, but the prevailing opinion is that the business outlook is very good.

Meeting of October 10, 1919, at Memphis (R., Vol. I, pp. 187, 188):

The replies to question No. 2 indicated that it would take an average of 36 days to ship out the total orders on hand, working under normal conditions, as compared with 37 days for the previous month.

The replies to question No. 3 indicated that the mills in the Memphis territory obtained during the month of September a 90 per cent of normal production, as compared with 80 per cent for the month of August. The estimated production for the months of October and November was 98 per cent of normal, but the members present stated that they did not expect to reach this figure.

The replies to question No. 4 indicated that the Memphis mills were carrying unsold stocks equivalent to 26 per cent of normal, as compared with 24 per cent for the previous month.

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Replies to question No. 8 indicated that labor difficulties and foreign exchange rates

were apparently the only exceptions to the general confidence in the business outlook. The demand for hardwood lumber continues good, and stocks are low.

Meeting of October 15, 1919, Shreveport (R., Vol. I, p. 189):

Replies to question No. 2 indicated that it would take an average of 27 days, working under normal conditions, to ship out the total orders on hand, as compared with 24 days for the previous month.

The replies to question No. 3 indicated that the mills in the southwestern territory secured a 70 per cent of normal production during the month of September, as compared with 58 per cent for the month of August. The estimated production for the months of October and November was 90 per cent of normal, but the members present at the meeting indicated that this percentage would not be obtained.

The replies to question No. 4 indicated that the mills in the southwestern territory had on hand October 1 unsold stocks equivalent to 22 per cent of normal, as compared with 19 per cent for the previous month. The unsold stock on hand in the southwestern territory is the lowest in any of the several hardwood territories.

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The replies to question No. 8 indicated that favorable market conditions will continue for the next few months. A few members are not so optimistic, but in the main there is confidence expressed for the next few months.

Actual hardwood exportations have increased during the past two weeks. We have passed the usual period when there is a reasonable dullness in buying, and there is nothing in the way now but labor troubles.

Meeting of October 17, 1919, at Jackson (R., Vol. I, pp. 190, 191):

Replies to question No. 2 indicated that it would take an average of 30 days, working under normal conditions, to ship out the total orders on hand, as compared with 27 days for the previous month.

The replies to question No. 3 indicated that the mills in the Jackson territory secured a 75 per cent of normal production during the month of September, as compared with 65 per cent for August. The estimated production for October and November was 92 per cent of normal.

The replies to question No. 4 indicated that the mills in the Jackson territory were carrying an unsold stock equivalent to 31 per cent of normal, as compared with 28 per cent for the previous month.

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The replies to question No. 8 indicated continued good business for the next several months, and perhaps for the next year, as the output has been so largely reduced below normal. The market has materially strengthened during the past three weeks.

The special subject for discussion at this meeting was that of "Costs," Mr. C. L. Faust leading the discussion. It was found, after

considerable discussion, that very few of the members had come to the meeting prepared to submit cost figures. It was therefore decided that we would continue this discussion at the next meeting, and the secretary would furnish all members with blanks on which they could bring cost figures to the next meeting, which would be comparable.

Meeting of November 11, 1919, at Cincinnati (R., Vol. I, pp. 192, 193):

The replies to question No. 3 indicated that it would take an average of 30 days to ship out the total orders on hand, working under normal conditions, as compared with 26 days for the previous month.

Replies to question No. 4 indicated that the mills in the eastern territory had a 78 per cent of normal production for the month of October, a reduction of 13 per cent from the previous month. The estimated production for the months of November and December was 88 per cent.

Replies to question No. 5 indicated that the mills in the eastern territory had on hand November 1 unsold stocks equivalent to 48 per cent of normal, as compared with 46 per cent for the previous month.

* * * * *

A discussion of question No. 9 brought out the fact that the members were expecting the good business to continue for the next few months at least.

Report of unfavorable weather conditions in the southern territory was commented on, the

members being agreed as to the probability of an extreme shortage of stocks by next spring.

Meeting of November 14, 1919, at Memphis (R., Vol. I, pp. 195, 196):

Replies to question No. 4 indicated that the mills in the Memphis territory had a production of 82 per cent of normal during the month of October, as compared with 90 per cent for the previous month, and that the production for the months of November and December was estimated at 77 per cent of normal.

Replies to question No. 5 indicated that the mills in the Memphis territory had on hand unsold stocks equivalent to 25 per cent of normal, as compared with 26 per cent for the previous month.

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Replies to question No. 9 indicated that there was little exception to the prevailing opinion that business conditions would continue good for the next few months.

A general discussion of market conditions was had, from which it developed that the extremely unfavorable weather conditions had greatly retarded the production of lumber, and that good business was almost certain to follow for the first half of the coming year.

Meeting of November 26, 1919, at Little Rock (R., Vol. I, pp. 197, 198):

A discussion of question No. 3 developed the fact that the average time required to ship out the total orders on hand, working under normal conditions, was 28 days this month, as compared with 36 days for last month.

The production report indicated that the production for the Little Rock territory for the month of October was 75 per cent of normal, with an estimated production of 79 per cent of normal for the next 60 days. A general discussion was held regarding the effect of the recent unfavorable logging conditions. It was believed that the heavy rains would materially further retard the production of lumber for the next 30 days.

The reports of stocks on hand indicated that the present total stocks were 52 per cent of normal, and that the present unsold stocks were 24 per cent of normal.

* * * * *

A general discussion of market conditions for the next few months was had. It was stated that the relation of the supply of hardwood lumber to the present demand could not possibly change within the next few months, and consequently there would be little change in market conditions, with a probably greater shortage of unsold stocks on hand. It was said that there will undoubtedly be an acute shortage by spring of next year.

Meeting of January 8, 1920, at New Orleans (R., Vol. I, pp. 200, 202, 203):

Replies to question No. 3 indicated that in the Jackson territory it would take an average of 40 days to ship out the total orders on hand, working under normal conditions, as compared with 38 days for the previous month. In the southwestern territory it would

take 24 days as compared with 34 days for the previous month.

The replies to question No. 4 indicated a 56 per cent of normal production in the Jackson territory for the month of December, as compared with 73 per cent in November, with an estimated production for January and February of 72 per cent. In the southwestern territory the production was 35 per cent of normal during the month of December, as compared with 50 per cent in November, with an estimated production for January and February of 70 per cent.

The replies to question No. 5 indicated that the stocks on hand at the mills in the Jackson territory on January 1 were 34 per cent of normal, as compared with 31 per cent on December 1. In the southwestern territory the stocks on January 1 were 22 per cent of normal, as compared with 20 per cent on December 1.

* * * * *

This question [Q. No. 8], however, brought forth some discussion as to the terms of sale. Mr. Gadd read a letter from Mr. J. W. Mayhew, of the W. M. Ritter Lumber Company, wherein all salesmen were instructed to accept no business except on terms net cash 60 days or 2 per cent discount for payment within 15 days of receipt of invoice. Mr. Mayhew urged the association and other members to adopt uniform terms of payment, stating that it was impossible for one concern to undertake to do this unless other concerns cooperated.

Mr. Du Bose stated that it was his opinion that the lumber belonged to the buyer from the time it was put into the car. Mr. Townsend said that there was a decision of the United States Supreme Court to that effect.

Mr. Hall said that it was his opinion that lumber should be sold f. o. b. the mill with a guaranty of association weights.

Mr. Ryan wanted to know how many were selling their lumber according to the sales code of the association. He said that if all would do so it would obviate most of the trouble regarding terms.

Mr. Faust moved that the Chair appoint a committee to work in conjunction with the association in the formation of a terms-of-sale contract that would establish a standard code of discounts. The motion was carried, and the Chair appointed the following committee: Mr. C. L. Faust, Mr. W. B. Morgan, Mr. C. J. Coppock, Mr. W. B. Brewer, Mr. J. W. Bailey.

The replies to question No. 9 indicated that about a 20 per cent of normal supply of logs was banked ahead of the mills. Ten of the concerns reporting used skidders in their log operations, the other using teams. The discussion indicated that those using teams had no prospect of logs for two or three months, while those using skidders would be able to log fairly well during the winter.

The replies to question No. 11 indicated continued good business. The demand for hardwood lumber is unabated.

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Mr. Faust stated that for the last 30 days he had been flooded with night wires and day telegrams from furniture factories seeking stocks.

Mr. Gadd stated that the furniture factories were all sold up and that it was impossible for retail furniture dealers to buy on a fixed price; that their orders were only being taken by the furniture manufacturers subject to the market price at the time shipments were made.

Meeting of January 13, 1920, at Cincinnati (R., Vol. I, pp. 205–207):

Replies to question No. 3 show that it would take an average of 34 days to ship out the total orders on hand working under normal conditions, as compared with 34 days for the previous month.

Replies to question No. 4 show that the production for the month of December was 78 per cent of normal in this territory and that the estimated production for the next 60 days would be 86 per cent of normal. This was a slight increase over the actual production for November.

Replies to question No. 5 indicated that the total present stock on hand was 72 per cent of normal and that the present unsold stock was 40 per cent of normal. This was a slight increase over the previous month, with 36 members reporting this month as against 22 members reporting for December.

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Replies to question No. 9 showed that the present log supply banked ahead of the mill was 85 per cent of normal, as compared with the situation in the Memphis territory where the supply was 40 per cent of normal, and with the southwestern territory where it was 20 per cent of normal.

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A discussion of question No. 11 brought out the fact that there was little exception to the general opinion that the outlook for business for the next few months was extremely good. The abnormal demand for hardwood lumber remained as strong as ever, and with the continually diminishing stock available there was every reason to expect a continuance of the present satisfactory condition for some months to come.

* * * * *

Mr. J. W. Mayhew brought to the attention of the meeting the question of strictly enforcing terms of settlement.

The secretary read a copy of a communication addressed to a number of lumber manufacturers in the eastern territory on this subject, and Mr. Mayhew read letters that they had received in reply to this communication.

Mr. Mayhew pointed out that in other lines of industry the terms of settlement were being strictly adhered to and that the manufacturer of lumber was obliged to pay for his machinery and supplies in accordance with the prescribed terms of settlement—that most all commodities were being marketed on the

basis of a 2 per cent discount for cash 10 days, and that banks also insisted on collecting their rates of exchange for out-of-town items.

Mr. Byrns stated that it was the policy of his company to close their open accounts with acceptances.

Mr. Hopkins advised that the time was opportune for manufacturers to enforce their terms, and Mr. Babcock stated that his concern sold largely to wholesalers who settled on the basis of 2 per cent cash 10 days or net 30 days, without regard to the date of receipt of the shipments.

After a thorough discussion of this subject, Mr. E. O. Robinson presented a resolution, seconded by Mr. F. R. Babcock, that this meeting favored the proposal of a strict enforcement of the terms of settlement and that it would support the efforts of the terms committee of this association in its endeavor to bring about such action as would be necessary to secure the enforcement of these terms, recommending to the committee the advisability of working in connection with the other association to accomplish this purpose. The resolution was unanimously carried.

Mr. Babcock suggested in this connection that the committee might work to advantage with the terms committee of the National Wholesale Dealers' Association, and that if desired he would take up this matter at the next meeting of the board of that association on March 15.

Mr. Hopkins suggested that the association should conduct a publicity campaign on this subject, wherever there was an opportunity to do so.

Mr. J. H. Townshend outlined the work of the Southern Hardwood Traffic Association in behalf of the hardwood industry, and urged those present to support this work through their newly established Cincinnati office.

Meeting of January 15, 1920, at Little Rock (R., Vol. I, pp. 207–209):

Replies to question No. 3 showed that the average time it would take to ship out the total orders on hand, working under normal conditions, was 28 days, as compared with 29 days for the previous month.

Under question No. 4 the reports of production indicated that in this territory the total production for December was 38 per cent of normal, as compared with 73 per cent for the previous month, with an estimated production of 61 per cent of normal for the coming 60 days.

Under question No. 5 a report of total stocks on hand showed that they were 43 per cent of normal for this territory, and that the percentage of unsold stocks to normal was 27 per cent.

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A discussion of question No. 9 developed the information that logs banked ahead of the mill were about 20 per cent of the normal supply. Very few of the mills have any very considerable supply of logs ahead, and at this time there was no immediate prospect of improvement of the situation.

A discussion of question No. 10 indicated that the log situation in this territory would materi-

ally interfere with production. Whether or not many mills could continue to operate or not would depend largely upon weather conditions.

A discussion of question No. 11 followed. There was no indication that members expect anything but a continued good business for some months to come. The demand continues strong for hardwoods and there is no probability of a production to balance the insistent demand, and it now appears that the consumers will be eager to take up the present available supply of hardwood lumber on hand.

* * * * *

The secretary brought to the attention of the meeting the question of terms of settlement, as suggested by a letter addressed to a number of manufacturers by the W. M. Ritter Lumber Company. After full discussion of this subject, it was moved, by Mr. G. W. Allport, and seconded by Mr. H. E. McCoy, that the secretary communicate to Colonel S. B. Anderson that it was the sense of that meeting that the time was opportune for lumber manufacturers to strictly enforce their terms of settlement, and that the chairman of the committee on terms would be supported in his efforts to endeavor to bring about whatever arrangements were necessary to this end.

Meeting of February 10, 1920, at Cincinnati (R., Vol. I, pp. 210–212):

Replies to question No. 3 indicated that it would take an average of 34 days to ship the total orders on hand. This was the same as last month, and indicated that the mills were

not selling very far ahead during the past 30 days.

Replies to question 4 indicated that the mills in the eastern territory secured 82 per cent of the normal production during the month of January, as compared with 78 per cent during the month of December—an increase during the month of January of 4 per cent. The estimated production for February and March was 92 per cent.

Mr. Stark called attention to the fact that conditions in other territories had not improved; that throughout the South a large number of the mills were shut down on account of weather conditions, and that more would doubtless shut down by April 1.

Replies to question No. 5 indicated that mills in the eastern territory in January had on hand, sold and unsold, about 70 per cent of normal stocks, as compared with 72 per cent for the previous month—a decrease during the month of January of 2 per cent. The replies also indicate that the unsold stocks in the eastern territory were 38 per cent of normal in February, as compared with 40 per cent on January 1.

It was stated that on account of lack of production in other territories, that in those territories there would be very little increase in the dry lumber stocks before July, and that probably normal stocks would not be reached before September 1.

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Replies to question No. 9 indicated that mills in the eastern territory were 90 per cent of

normal, and that the logs banked ahead of the mills indicated that this territory is rapidly reaching a normal production of logs.

Replies to question 10 indicated that replies to question No. 9 are correct, and that very little time will be lost through the mills shutting down on account of the log supply.

Replies to question 11 indicated a favorable outlook for business could not be expected until way on into the fall of this year. The demand continues to take up all available stocks offered.

Mr. Burns referred to the effort to stabilize prices, and stated that it was not within the power of any individual to steady the present market; that certainly prices were high enough.

Mr. Mowbray stated that in his opinion prices were entirely too high.

Mr. Mayhew said that admitting that prices are high, how can you stop them from going higher? He said Mr. Ritter had tried to do it at a considerable financial loss to himself.

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Discussions followed as to stocks on hand and consuming plants.

Mr. Blair stated that the Chattanooga furniture factories were carrying heavy stocks.

Mr. Linerhan said that in his opinion stocks and consuming plants were very low; that nearly all of these plants had their output sold for months ahead at prices prevailing at the time of shipment.

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It was the unanimous opinion of the members present that the manufacturers should

have terms that would be fair both to the buyer and the seller, and then use them in selling their production. It was felt that some separate provision should be made for purchasers of railroad material, and as between wholesalers and consumers.

Meeting of February 12, 1920, at New Orleans (R., Vol. I, pp. 214–216):

Replies to question No. 3 indicated that it would take an average of 31 days to ship out total orders on hand, working under normal conditions, as compared with an average of 33 days for the previous month.

The replies to question No. 4 indicated that the mills in the southwestern territory had obtained during the month of January 55 per cent of normal production, and it was estimated that the production for February and March would be 68 per cent of normal. The summary showing comparative conditions in the eastern territory was attached.

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The replies to question No. 5 indicated that the mills in the southwestern territory had on hand sold and unsold 37 per cent of normal stocks and 22 per cent of unsold stock to normal. This report shows a decrease in total stocks of 10 per cent during the month of January, and of unsold stocks a decrease of 6 per cent during the month of January.

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Replies to question No. 9 indicated that the mills in the southwestern territory had about 20 per cent of a normal supply of logs banked ahead of the mill.

Replies to question No. 10 indicated that eight members report mills shut down on account of log shortage. Several mills reporting no hardwoods and in fact running only a portion of the time. Resumption of operations depends entirely on weather conditions.

Replies to question No. 11 indicated a continued good business for the spring months and into the coming summer months.

Mr. Brewer stated that he did not believe it possible for the production of mills to catch up with the demand before the middle of the coming summer, if then. As a result an advancing market can be looked for. Believe it would be a good idea if some plan can be worked out to stabilize the market.

Mr. Cecil stated that his company was well sold ahead for shipments scattered all through the year.

Mr. Norman stated that he had 15 cars sold ahead and that if they were shipped out it would clean out all of the dry stock he had, consequently he will not have any more stock to offer during the next four or five months.

Mr. Logan stated that his company was contracted ahead for some time on the basis of the present market.

Mr. Welsh stated that his plant only started operating last November, and that while they ought to have 2,000,000 feet of lumber on sticks, they only had 600,000 feet as the result of weather conditions, and had only one day's run of logs ahead of his mill.

Mr. Stanford stated that it was his business policy not to book orders too far ahead as

he had never heard of anyone making money doing so. The buyer could always cancel if the market went down, but the millman must deliver the goods if the prices go up.

Mr. Smith stated that he had booked some orders ahead but that his production was far below normal.

Mr. Larson stated that he was sold up on all stock that he had ready for shipment, and had no logs ahead of the mill at this time.

Mr. Davis said that he had orders for 350 cars of pine and hardwoods and was entirely sold up and had no more lumber to offer.

Mr. Edwards stated that in his opinion the demand would be unusually good until the month of May at least, and possibly all through the year. The only fear he had was that prices would go too high.

Mr. Adams stated that it was the policy of his firm to cut up the logs, place the lumber on sticks, and then sell it.

Mr. Thompson stated that he was taking a few orders ahead but no large ones; believed that all manufacturers ought to be satisfied with present prices.

Mr. Brenner stated that in his opinion the demand would continue good because trade conditions throughout the country were very good.

Mr. Morgan stated that there was nowhere near enough lumber to supply the demand and would not be even if the mills were working under normal conditions.

Mr. Sanguinett stated that he was only booking orders for such stock as he could ship; was not accepting future business.

Mr. Porter stated that he was only taking orders for which delivery could be made immediately, but his greatest difficulty was because of the scarcity of cars.

Mr. Faust stated that it was his policy to sell 30 days ahead because he could see no sense in having cars placed on his siding and no orders to load them with.

Mr. Toung stated that, in his opinion, the export demand would open up in the late spring months. There was apparently some export demand for thin stocks, but none for the thicker dimensions.

Meeting of February 17, 1920, at Memphis (R., Vol. I, pp. 219, 220):

Replies to questions Nos. 2 and 3 indicated that it would take an average of 37 days to ship out the total orders on hand, as compared with an average of 31 days for the previous month.

Mr. Stark stated that this was partly caused by the inability of the mills to make shipments.

Replies to question No. 4 indicated that the mills in the Memphis territory secured a 45 per cent of normal production during the month of January, as compared with 47 per cent for the month of December. The estimated production for February and March was 62 per cent of normal.

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Replies to question No. 5 indicated that the mills in the Memphis territory on February 1 had 45 per cent of normal stock on hand, sold and unsold, as compared with 54 per

cent in January, a decrease during the month of January of 9 per cent; and that the unsold stocks on hand were equivalent to 23 per cent of normal in February, as compared with 29 per cent in January, being a reduction of 6 per cent during the month of January. This, with the inability to make shipments, proves out the increased number of orders on hand, as exhibited by answers to questions 2 and 3.

* * * * *

Mr. Mayhew referred to the matter of terms. He said that in his opinion the lumber industry should have one set of terms that are fair to both the buyer and the seller.

Various other members talked on this subject—some indicated that it was rather a stale subject; others that the association terms are not satisfactory.

Mr. Stark stated that the smaller mills were more careful about terms than the larger mills.

Mr. Pritchard stated that the terms used by the veneer manufacturers were 30 days net. These terms are entirely satisfactory to the trade.

Replies to question No. 9 stated that the mills in the Memphis territory had about 40 per cent of normal logs banked ahead of the mill. This is the same as last month.

Replies to question No. 10 indicated that 15 mills were shut down in this territory, and 7 mills running part time on account of log shortage.

Replies to question 11 indicated favorable market conditions for the next few months.

There have been little or no improvement in the logging situation over 30 days ago, so the possibilities of an immediate increased production are lacking, while the demand continues apparently as strong as ever.

Meeting of February 19, 1920, at Little Rock (R., Vol. I, pp. 221–223):

Replies to question No. 3 indicated that it would take an average of 36 days to ship out total orders on hand, working under normal conditions, as compared with 28 days for the previous month. Mr. Holmes stated that this would indicate that the members were booking future business more heavily than they had heretofore done.

Replies to question No. 4 indicated that the mills in the Little Rock territory obtained during the month of January 49 per cent of normal production as compared with 38 per cent during the month of December. The estimated production for February and March is 52 per cent of normal. Mr. Williams stated that this estimate would only be realized if weather conditions were favorable; that if rains continued, in his estimation the production would not exceed 40 per cent.

Replies to question No. 5 indicated that the mills in the Little Rock territory on February 1 had 43 per cent of normal stocks on hand, which is the same as for the two previous months. Unsold stocks on hand were 22 per cent of normal, which was a reduction of 5 per cent over January 1.

Mr. Holmes called attention to the fact that the reduction of 5 per cent in the unsold stocks

was borne out by the increase in the total orders, as indicated in the replies to question No. 3.

Mr. Thompson called attention to the fact that certain classes of consumers had very limited stocks of dry lumber on hand; that their production was sold for months ahead and for that reason they will continuously be in the market, and with them it is not a question of price; it is where can they get the stock.

* * * * *

The replies to question No. 11 indicated that the general outlook for the market is good; that there is no apparent falling off in demand and little prospects of an increased supply.

Other subjects were discussed than those mentioned in the above quotations; but it will be observed that, not satisfied with the information received through the manager's reports with reference to all the elements that control prices, they held these frequent meetings, in which they engaged personally in extended discussions, exchanging views with reference to the present and prospective conditions of those elements. This personal discussion and contact was especially emphasized and insisted upon, because they thereby not only obtained the advantage that a court derives from an oral argument in addition to the printed briefs, but the spirit of antagonism which one naturally has for a competitor was broken down, and in its stead was developed a friendly spirit of cooperation, resulting in concert of

action as to every important matter common to their business activities.

How such an organization perfects its scheme for an interchange of all knowledge relating to the industry, and how it necessarily begets concerted action in the manufacture and marketing of the product, is shown by the above quotations from the minutes of the association's meetings.

The information with reference to the log supply banked ahead at the mill was first given in the manager's report of December 1, 1919 (R., Vol. II, orig. p. 984); and thereafter this subject was discussed in the several meetings. This very important inquiry apparently had not been made in the questionnaires sent out previous to November, 1919.

So at first the members were asked the brief question, "What is the general outlook for business?" But in the questionnaire upon which the July and subsequent reports were based the question was, "What is your view of market conditions for the next few months—what is the general outlook for business? State all the reasons for your conclusions," thus provoking a general discussion upon the subject.

The resolution passed at the meeting of August 15, 1919, at Jackson is significant. It reads:

> Whereas we think that now is the opportune time to take action to see that orders are so made that they will constitute a contract between the buyer and seller; and,
>
> Whereas, the reports of the members of the American Hardwood Manufacturers' As-

> sociation indicate that they are filling orders at from ten to sixty dollars under the market:
>
> *Be it resolved*, That an associated effort be made at this time, so that the members will be protected against cancellations should the market decline. (R., Vol. I, p. 164.)

The connection of the first and third with the second paragraph is not quite clear, but it was manifestly intended by the second paragraph to warn those underselling the market to charge from $10 to $60 per thousand more for their lumber, and by the first and third paragraphs to bring about the adoption of a uniform contract which would be binding upon the buyer.

In the meeting of January 8, 1920, at New Orleans, there was quite a discussion about terms of sale. From a statement made by Mr. Ryan, it appears that the association had a sales code. The discussion finally terminated in the adoption of a resolution—

> that the chair appoint a committee to work in conjunction with the association in the formation of a terms of sale contract that would establish a standard code of discounts—

nd five gentlemen were appointed by the chair upon he committee. An agreement as to uniform terms f sale would within itself be unlawful because the erms of sale constitute an important element of ompetition, just as good service in the operation a railroad is an element of competition.

The same subject, but called "terms of settlent," was discussed at the Cincinnati meeting of

January 13, 1920, and it resulted in the adoption of a resolution—

> that this meeting favored the proposal of a strict enforcement of the terms of settlement, and that it would support the efforts of the terms committee of this association in its endeavor to bring about such action as would be necessary to secure the enforcement of these terms, recommending to the committee the advisability of working in connection with the other association to accomplish this purpose.

And Mr. Babcock suggested that the committee might work to advantage with the terms committee of the National Wholesale Dealers' Association.

The same subject was before the meeting at Little Rock of January 15; and it was resolved that the secretary communicate to Colonel S. B. Anderson that it was the sense of that meeting that the time was opportune for lumber manufacturers to strictly enforce their terms of settlement, and that the chairman of the committee on terms would be supported in his efforts to endeavor to bring about whatever arrangements were necessary to this end. This subject was also mentioned at the Cincinnati meeting of February 10, and the Memphis meeting of February 17.

While no final action had been taken upon this subject when the bill in this cause was filed, yet what the result would have been may fairly be inferred.

Unquestionably the membership of the association had been warned against doing anything from which actual agreements as to prices might be in-

ferred, yet from time to time prices were discussed in their meetings, and, of course, were generally considered in the market letters, and were always discussed in the manager's report under the head of "Outlook for further business."

CORRESPONDENCE.

A merely incidental remark of a member of an association as to the effect of its operation would be entitled to but little consideration; but on April 23, 1919, when the present association had been in existence only some four months, the manager of statistics sent to the membership a letter in which he said:

> Every member of the plan has no doubt received some benefits therefrom, and we believe it would be wise to have the members reduce to writing their experience with the plan in order that a record may be preserved.

and every member was requested to write a letter—

> relating his experience with the plan, and any particular incident that might have occurred to him personally whereby he received any benefits from the plan or became more interested in its workings (R., Vol. II, orig. p. 1118).

Not having received a reply from all the members, on May 27 he sent out another letter, calling attention to his previous request and adding:

> We have not heard from you in reply to this letter, and take the liberty of again bringing

this matter to your attention, as it is our desire to have all members reduce their experience to writing, in order that a record may be preserved. Every member of the plan has no doubt received some benefits therefrom, and if you will devote a few minutes of your time relating this to us it will be appreciated. (R., Vol. II, orig. p. 1119.)

To these letters a number of replies were received, and from some of them the following expressions are taken, because they detail facts and express the views of those members after they had experimented with the organization, and had deliberately considered its effects:

Southern Pine Lumber Company, April 24, 1919:

> * * * I have derived great benefit and assistance from the open competition plan of the association. I consider the reports of actual sales of great help in determining the market value of hardwood lumber and believe that the plan is a stabilizing influence, which tends to raise the prices of those who are inclined to cut their prices to the top market prices. It is obvious that no one wants to sell his lumber for less than the other fellow is actually getting, and your reports of actual sales enable the manufacturer to see what his neighbors are getting for their lumber; and through this course of education, I might say, all those who have access to your reports bring their prices to the top. (R. Vol. II, orig. p. 1120.)

Dorsey Land & Lumber Company, April 25, 1919:

> As we see it, this plan has done more to stabilize prices than any other feature of associational work. We refer to these sales reports continuously, and find them of inestimable value. (R. Vol. II, orig. p. 1121.)

Chas. F. Luehrmann Hdw. Lbr. Co., May 29, 1919:

> * * * We beg to say that our experience has been that the open competition plan has been absolutely accurate, but instead of apparently stabilizing the market it has caused a runaway market.
>
> Of course this has been helped by the fact that through the decrease of lumber production the market has been very bare and the buying has been hurried, because every time a quotation went out it was at a higher price. Whether this situation is particularly desirable is a question in our minds, but as far as the open competition plan is concerned it certainly has posted everybody, as you said it would in the beginning, and to that end it is completely satisfactory. (R. Vol. II, orig. p. 1122.)

Yellow Poplar Lumber Company, June 3, 1919:

> * * * The plan in numerous instances has enabled us to secure more money for our product than we otherwise would have secured without this plan in operation, and we consider this feature probably the most important of the association work.
>
> The open competition plan is particularly of great help when we are in the midst of a rising market, as we now are in, it enabling the

members to know promptly prices that are being obtained, thereby allowing them to keep pace with the rise in much better time than they otherwise could do. We should feel lost without the open competition plan in operation. (R. Vol. II, orig. p. 1123.)

North Vernon Lumber Company, June 3, 1919:

The open competition plan of the American Hardwood Manufacturers' Association has been of no little benefit to us, and we are enthusiastic about the plan.

Under the old plan of every one for himself prices were not so stable and it took them longer to go up and the[y] came down more quickly. * * *

Under the new plan it is very easy to see when stock is sold too cheaply, and it is a great satisfaction to sell over the market. There seems to be a friendly rivalry between members to see who can get the best prices, whereas under the old plan it was cutthroat competition. Now it is a pleasure to sell because *WE KNOW* what we are doing and have information at our finger tips that enables us to know these things before the other fellow does. (R. Vol. II, orig. p. 1124.)

Barr-Holaday Lumber Company, June 5, 1919:

In the first place, in the old way of reporting the average prices received we had no way of knowing what class of mills we were competing with, while under the "competition plan" we can take the average prices received and then go through the report and find what particular mills have shipped the stock, and

in that way we base our prices on prices received by mills making the same class of stock and as near as possible the same quality of stock as our own. In the old way of reporting very often for financial reasons a large block of stock would be sold at a low price and this low price would help to make a low average price on the total amount of that particular kind of lumber, while in the "open competition plan" we can in making our price eliminate such a transaction and, as stated above, base our prices on prices received by large manufacturers; and to my mind the "open competition plan," if all the mills would join the same, it would stabilize the prices. * * *

Summing it up as I see it now, certainly think that any of our members that stay out of the "open competition plan" are standing in their own light and are losers every month they stay out. (R. Vol. II, orig. p. 1125.)

The Nigh Lumber Company, April 25, 1919:

Our experience with various price-fixing plans in the early day were humiliating and costly, and for that reason we stood off from this open competition plan for some time, but we finally went into it, the exact date we do not remember.

The first experience we had of the benefits were this: We had been selling quite a good deal of stock to a wholesaler whose trade was very desirable to us; he telephoned us that he was coming down to see about the purchase of a block of two hundred thousand feet of 4/4" sound wormy chestnut; we, of course, made

up our mind the price we expected to ask for this, and the morning he came we received the first report of the open competition plan giving the market prices as they do now; when this buyer came we turned to this pamphlet and put $2 per M′ more than we intended to ask, and he did not exchange a word but took the stock; the sight of the pamphlet was all the argument he wanted. (R. Vol. II, orig. p. 1127.)

Baxter Lumber Co., May 31, 1919:

> The very first report which we received under this plan enabled us to increase our price $6 per thousand on a special item in oak. We had just taken on a small order at what we thought was a satisfactory price, but discovered immediately that others were getting more money, and since that time we have booked orders for a number of these special items at an increase of $6 per thousand. (R. Vol. II, orig. p. 1128.)

H. D. Glass Lumber Co., May 29, 1919:

> * * * By watching reports of others and keeping up on the weekly bulletins we have been able to close out our dry stock at from $1 to $3 above the general quotations. (R. Vol. II, orig. p. 1129.)

New Deemer Mfg. Company, Inc., May 29, 1919:

> * * * As a concrete illustration of this, the writer attended the meeting at Jackson on last Friday, and when he went to Jackson was anxious to sell some No. 2 gum at $18 per thousand. After the meeting the office

called him over telephone, saying they had wire inquiry for No. 2 gum and asked what price to quote customer. Acting upon information obtained at this meeting, he advised the office to quote $20 f. o. b. mill, and received an order for 100,000 feet on this basis. If no other benefits were derived from this meeting, the trip was worth exactly $200 to us. I was also under the impression that $60 was a good price for 1st and 2nd plain oak, but after the meeting I quoted on an inquiry for this and raised my price $7 per thousand and received the order. (R. Vol. II, orig. p. 1130.)

George C. Brown & Company, May 28, 1919:

* * * The most direct benefit your price plan has given our company was at a recent Memphis meeting, when it developed our company was carrying an unusually large stock in thoroughly dry red gum, and seemed to be the only one, among those present, who had it, other firms having moved out their stock. Within two weeks from the date of this meeting, where it developed there was a big shortage of red gum items, we found a most unusual demand, at prices we had not hoped for.

It is difficult to estimate just what this information meant to us, but at any rate it would not be much out of the way to say that this information enabled us to obtain business for these items that brought us returns over and above our anticipations, returns probably 5 to 10 times more than our annual dues. (R. Vol. II, orig. p. 1131.)

Hoffman Brothers Company, in their reply, dated April 25, 1919, state in detail an instance where they were enabled to obtain $5 per M on quartered oak more than was received by merchants who were not members. (R. Vol. II, orig. pp. 1132–1133.)

Henry Maley Lumber Co., May 28, 1919:

> * * * Since we have become members we have been selling our lumber at several dollars per M more than formerly, and we are perfectly satisfied with the plan. (R. Vol. II, orig. p. 1134.)

Bond-Foley Lumber Co., May 30, 1919:

> We are sure that we have profited wonderfully through the information revealed through these reports. A concern like ours, who have no men on the road, is benefited more by this than concerns who are represented by salesmen in the various consuming districts.
>
> We believe that we have profited from $500 to $1,000 in the past 30 days by being informed *correctly* relative to the prices stock is really being sold at. (R. Vol. II, orig. p. 1135.)

The Ironton Lumber Company, May 31, 1919:

> * * * Prior to the beginning of the open competition plan that we did quite a bit of wholesaling and was able to buy lumber from our friends and make from $1 to $5 per M', and now since the open competition plan has come into existence our friends are able to get practically as much for their lumber as we are for ours.

On the other hand, by being able to keep posted, we feel that we are able to get enough additional money over former prices for our stock that we can afford to cut out wholesaling, and personally we think the plan is great. (R. Vol. II, orig. p. 1136.)

Carrier Lumber & Mfg. Co., June 3, 1919:

* * * The information we get from these reports enables us to market our lumber at better values than we could secure without such information. (R. Vol. II, orig. p. 1137.)

H. G. Bohlssen, June 3, 1919:

Before becoming a member of the open competition plan I know I have sold a good many cars of lumber three or four dollars under the market value to wholesalers, upon which they reaped the benefit of my ignorance. (R. Vol. II, orig. p. 1138.)

Eastman, Gardiner Hardwood Company, May 30, 1919:

It has kept us in touch closely with the market and in many instances has made us one or more dollars per thousand feet on lumber that we have sold and we believe that the plan is going to be very successful in carrying out the purposes for which it is intended, and we sincerely trust that all the members will pay close attention to the information given out from your office at Memphis, and if they do this we believe it will enable us to hold prices up to where we can make some money. (R. Vol. II, orig. p. 1139.)

Lieberman, Loveman & O'Brien (date not given; probably May 29, 1919):

> * * * We now are convinced that it has been of great service to us, especially in the last few months, where we have been kept posted about the prices, etc.
>
> In fact, we know of others as well as ourselves who use the actual sales in guiding us as to prices to quote. We take it for granted that the average is arrived at from prices obtained from small dealers and also from large dealer, and we believe that we should receive as much for our stock as anyone and we generally quote a little higher than the actual sales prices are. So far in the last forty-five days we have seldom failed to land the order. (R. Vol. II, orig. p. 1140.)

Broadhead-Garrett Co., May 30, 1919:

> * * * The greatest benefit I have derived is from the average price statement, which is really a composite of all sales and to my mind is really the market on an average grade. (R. Vol. II, orig. p. 1145.)

Bomer-Blanks Lumber Co. Inc., June 10, 1919:

> * * * We have received more valuable information in regard to the prices being obtained for hardwood lumber from the open competition plan than by any other method. * * * (R. Vol. II, orig. p. 1146.)

Kentucky Lumber Company, April 25, 1919:

> We could enumerate many instances in which the information has been very valuable and has been the means of our getting a line on prices and movements of various items,

which otherwise it would have been absolutely impossible for us to obtain. (R. Vol. II, orig. p. 1147.)

James E. Stark & Co. Inc., May 28, 1919:

* * * We are heartily in favor of it, as it enables the members of this plan to keep in touch with each other as to the amount of stock that is available and also prices that the stock is being offered for and received by other members. We think the results of a work of this kind are so manifest that it is not necessary to recall the special incidents where it has been a benefit to us. (R. Vol. II, orig. p. 1148.)

Nickey Brothers Inc., May 29, 1919:

The feature that stands out above everything else is the fact that this market report shows the man who made the sale. The price does not mean much to us without knowing who made the sale. (R. Vol. II, orig. p. 1149.)

Lamb-Fish Lumber Company, April 29, 1919:

The instances are so frequent where we have realized the saving in making sales by using freely the information disseminated by the statistical department of the American Hardwood Manufacturers' Association that we are not in position to cite any one particular transaction by which we were benefited by studying closely the report of sales made each week.

We wish to state, however, that any lumber manufacturer who does not insist upon his sales manager using your service to fullest extent is working a hardship on the sales de-

partment and losing money for himself. (R. Vol. II, orig. p. 1150.)

Clearfield Lumber Company, April 25, 1919:

> * * * The open competition plan has developed a sort of friendship among the hardwood manufacturers that did not exist before that time.
>
> Many members of this association have told me to whom they have sold stock, and what prices they get for it. * * *
>
> We figure this open competition plan has been worth every cent and more than it has cost the producers of hardwood lumber, and we would not be without it under any consideration. (R. Vol. II, orig. p. 1151.)

Lyon Lumber Company, April 25, 1919:

> It would be difficult to enumerate the number of incidents at this time in which we have been materially benefited by having had the information before us in the shape that it has been compiled from the various reports that you have issued from time to time. This is particularly advantageous to a firm who have been out of the market for some little time on account of lack of stocks, etc., and then find themselves with some lumber in shipping condition. The first thing that we usually do, and presume that the rest of them do, is to turn to these reports and find out what the market price is. (R. Vol. II, orig. p. 1152.)

The Sun Lumber Co., June 2, 1919:

> * * * There has also been several times lately when the information given us has been of direct financial profit. (R. Vol. II, orig. p. 1156.)

Huie-Hodge Lumber Co., June 5, 1919:

> * * * In order to make it a success, all members should report so that all could have the opportunity of knowing what the other fellow is doing. When a salesman has information of that kind, it spurs him up to try to get the market price at least for his products. We think that this is the greatest proposition that the manufacturers of lumber ever had offered them, and they should all take advantage of it. (R. Vol. II, orig. p. 1157.)

Pelican Lumber Company, June 2, 1919:

> We are beginning to rely upon the information furnished in these reports to the extent that every sale is a particular incident as to securing values for our product. * * * (R. Vol. II, orig. p. 1159.)

Dierks Lumber & Coal Company, June 3, 1919:

> * * * We can assure you that so far it is proving very valuable to us, and we observe very closely the information obtained therefrom. (R. Vol. II, orig. p. 1160.)

Tallahatchie Lumber Co., May 28, 1919:

> * * * We have received so many benefits from the open price competition plan that we can not recall any specific case at this time that we can relate.
>
> We do know, however, that the open price competition is the most educating system that has ever been introduced to the lumber manufacturers and is a system that, in our opinion, should be used by every manufacturer in the hardwood districts. (R. Vol. II, orig. p. 1162.)

Weis-Dillman Lumber Co., May 28, 1919:

> * * * From our experience in the egg-case business and other associations which we have associated with, it is our opinion that the American Hardwood Manufacturers' Association open competition plan, as managed by the officers, is a wonderful institution and will always have our hearty cooperation and loyal support. (R. Vol. II, orig. p. 1168.)

J. H. Leavenworth & Son, May 28, 1919:

> * * * beg to say that it has been a benefit to us so far, and that we believe it will be much more a benefit now that you are going to send your reports out as first-class mail, as it will be a big help to ourselves, and anyone selling from the mill office, to get these reports at the earliest possible date. (R. Vol. II, orig. p. 1169.)

The Long-Bell Lumber Co., May 29, 1919:

> * * * The main thing is promptness in getting it out. Conditions are changing very rapidly in the lumber business at present, and dispatch of this information is invaluable, much more so than at times when conditions are normal. (R. Vol. II, orig. p. 1171.)

John B. Ransom & Company, May 28, 1919:

> We think our opinion can be summed up into one word, "*SPLENDID*," for it certainly is a splendid proposition if all the members will cooperate. (R. Vol. II, orig. p. 1172.)

The Mowbray & Robinson Co., May 29, 1919:

> * * * found the plan a great benefit to us, especially in attending the meetings and hearing the general market talk by the va-

rious members represented at these meetings. We have always left these meetings feeling that we did not get enough money for our lumber and that we ought to try to do better. (R. Vol. II, orig. p. 1173.)

The facts stated and the reasons assigned for the benefits received, as set forth in these letters, show beyond question that the organization and the carrying into effect of its plans of operation produced exactly the results that the Government argues it was bound to produce.

INCREASE IN PRICES.

The extent to which prices increased from the organization of the present American Hardwood Association to the filing of the bill in this cause is indicated by comparing the prices of a few of the important varieties, sizes, and grades of lumber as given in the reports of January 25, 1919, and January 31, 1920. This comparison, in a convenient form, is as follows:

[Fas means firsts and seconds, and C&S means common and select.]

GUM.

	Dimension.	1919	1920	Per cent of increase.
Fas quartered red	4/4	$53.00	$200.25	277.8
Do	5/4	55.00	186.75	229.6
Do	8/4	60.00	237.00	295.0
No. 1 com. and better, quartered	8/4	48.00	213.00	343.75
Fas plain red	4/4	49.00	182.50	272.4
Do	5/4	51.00	188.50	269.6
Do	6/4	56.00	167.00	198.0
No 1 C&S plain red	3/4	34.00	121.75	258.0
Do	4/4	39.00	148.25	280.0
Do	5/4	41.00	161.25	297.7
Do	6/4	42.00	150.25	257.7
No. 1 C&S plain sap	4/4	28.00	80.50	187.5
No. 2 com. sap	4/4	26.00	48.50	85.8
No. 3 com. sap	4/4	22.00	35.75	62.5
Do	5/4	23.00	37.00	60.9

(R. Vol. I, orig. pp. 47, 78, 82, 86–89.)

OAK.

	Dimension.	1919	1920	Per cent of increase.
Fas quartered white	4/4	$91.50	$297.50	225.0
Do	5/4	113.00	315.25	179.0
Fas plain white	4/4	67.00	184.00	174.6
Do	6/4	68.00	217.50	219.8
Do	8/4	72.00	188.75	162.0
Do	12/4	87.00	258.50	197.0
Do	16/4	90.00	209.50	132.8
No. 2 common plain	4/4	29.00	84.25	190.5
No. 3 common plain	4/4	20.50	43.25	111.0
No. 4 common plain	4/4	18.00	24.00	33.3
Fas quartered red	4/4	81.00	226.25	179.3
No. 1 C&S quartered red	4/4	45.60	178.50	296.6
Fas plain red	4/4	64.00	185.50	190.0
No. 1 C&S plain red	4/4	40.89	132.75	224.6
Do	8/4	52.00	144.75	178.0
No. 2 common plain red	4/4	29.00	.....	.....

(R., Vol. I, orig. pp. 55, 56, 94, 96–99.)
(R., Vol. II, orig. pp. 56, 57, 100–102.)

ASH.

	Dimension.	1919	1920	Per cent of increase.
Fas	4/4	$75.00	$188.75	151.6
Do	8/4	96.00	211.50	120.3
No. 1 C&S	8/4	55.00	113.00	105.4
Do	5/4	60.00	129.50	115.8
Do	8/4	73.00	205.25	181.0
No. 2 common	4/4	32.00	67.75	111.7
Do	5/4	36.67	67.75	84.8
Do	6/4	39.00	62.25	59.6
Do	8/4	43.00	120.25	179.6
No. 3	4/4	25.00	38.75	55.0

(R., Vol. I, orig. pp. 58, 59, 105, 106.)

The foregoing comparisons are of prices at Cairo for the Southern territory, but the following are of prices at Cincinnati for the Eastern territory, no poplar having been reported for the Southern territory in 1919.

POPLAR.

	Dimension.	1919	1920	Per cent of increase.
Fas quartered	4/4	$91.00	$160.00	75.8
No. 1 common quartered	4/4	60.00	97.50	62.5
Fas plain	5/8	69.50	122.25	75.9
Do	4/4	86.36	159.00	84.0
Do	6/4	84.25	159.50	84.25
Do	8/4	88.00	176.50	100.6

(R., Vol. I, orig. pp. 66, 67, 129, 130.)

It will be observed that there was no stabilizing of the market, nor was there any tendency toward uniformity of prices. On the contrary, there was a much greater spread in prices in January, 1920, than there was in January, 1919. For illustration, take the lowest and the highest prices received for the varieties and grades of lumber in January, 1919, and in January, 1920, as follows:

1919.

	Dimension.	Lowest.	Highest.	Difference.
Fas sap gum	4/4	$33.00	$40.00	$7.00
No. 1 common sap gum	4/4	28.00	30.00	2.00
No. 2 common sap gum	4/4	26.00	28.00	2.00
Fas plain white oak	4/4	64.00	70.00	6.00
No. 1 C&S plain white oak	4/4	40.00	40.00	0.00
No. 3 common white oak	4/4	20.00	22.00	2.00
Fas poplar	4/4	76.00	94.00	18.00
No. 1 common poplar	4/4	54.00	59.00	5.00

1920.

	Dimension.	Lowest.	Highest.	Difference.
Fas sap gum	4/4	$88.25	$110.75	$22.50
No. 1 common sap gum	4/4	69.50	91.00	21.50
No. 2 common sap gum	4/4	40.25	68.00	27.75
Fas plain white oak	4/4	134.50	215.75	81.25
No. 1 C&S plain white oak	4/4	100.00	149.00	49.00
No. 3 common white oak	4/4	33.00	52.25	19.25
Fas poplar	4/4	140.00	186.00	46.00
No. 1 common poplar	4/4	76.75	130.00	53.25

(R., Vol. I, orig. pp. 54, 55, 56, 67, 68, 86–88, 132, 133.)

APPELLANTS' EVIDENCE.

Appellants' evidence begins in the second volume, on page 1095, and it consists of numerous affidavits and exhibits attached thereto wherein they explain the nature and details of the organization known as the American Hardwood Association, and its operation, there being no essential difference in their explanation from that given in appellee's evidence. They point out and emphasize the abuses and defects in methods practiced in the industry, which it is claimed the organization was intended to obviate. They deny that they ever entered into any agreement or had any understanding with reference to the production and prices of lumber, and show how wide were the differences in the prices charged by them; and they go into lengthy details as to the conditions and circumstances which they say controlled both production and prices. There is, in fact, but little contradiction in the evidence introduced by the two sides as to the material facts; and a full statement of the evidence of either the United States or the appellants would include all or nearly all of the essential facts.

Attention is called to the fact that in July, 1919, the membership concluded that they were not receiving information as to prices as often as they should, and hence the manager began to send out *weekly* reports of prices. (R., Vol. II, pp. 1238, 1239.) He thereupon wrote the association's counsel to the effect that the members had become so much interested in the open competition plan

instead of holding monthly meetings in Memphis they were holding meetings on Friday of each week; that they mailed out their report on Thursdays, which included all sales up to the previous Saturday, and hence when the report was sent out they had on hand information which would be contained in the following week's report, and the members were thereby kept about a week behind in receiving information; and that he had been asked to prepare and read at those weekly meetings a statement of the high, low, and average prices for the report mailed the day before, and also to make a report of the high sales then in the office, which would go into the following week's report, the purpose being that the members might—

> get up-to-the-minute information as to the high sales reported to the association.

He suggested that the only thing that occurred to him that might be subject to criticism was the fact that the bulletins referred only to high sales, but he explained that it involved considerable work to go through the orders and get the high sales, and hence they made no effort to get the low ones, but he stated that he did not want to do anything which might be construed as a combination in restraint of trade, and asked for the counsel's advice. (R., Vol. II, pp. 1240, 1241.) On July 30 the counsel replied, in which, among other things, he said:

> It is my judgment that it is unwise, especially at this time, to circularize this form of market report, and this because the conclu-

sion is liable to be reached that the high peaks are designedly given for the purpose of forcing up the general market. Even under normal conditions I doubt the legal wisdom of this method, but at the present time I feel the plan is especially dangerous. It is generally conceded in Washington that the Department of Justice is going to indulge in a very searching investigation as to the causes for high prices, and for this reason industrial group activities will be carefully scanned. I know that the activities of the American square with the law, and that there is no purpose or design by it in the conduct of the open price competition plan of the American to do aught that will impinge on the law, and in this I realize that there is no thought on your part of an improper use of the memorandum data that you were inquiring about; at the same time to those who are not familiar with our conditions this data might give the appearance of illegality. I therefore recommend its discontinuance. (R., Vol. II, p. 1242.)

On November 17, 1919, the secretary-manager again wrote the counsel calling his attention to the lack of stability of the market, and stated that many engaged in the industry declared if those market conditions continued the industry would be made to suffer, as it might create a demand for substitutes for lumber, and that at the Open Competition meeting the day previous the dominant thought was that the industry was handicapping itself by these mounting prices; and that the members discussed quite

freely as to ways and means whereby this increased price tendency might be held in check, and he expressed the opinion that if the meetings could be held weekly the effect would be helpful in tending to stabilize the market, holding the runaway conditions in check; but said that before acting he wished to be advised. To this letter counsel replied on November 28 as follows:

> In reference to the suggestion canvassed while I was in Memphis concerning which you have written me, touching the feasibility of holding more frequent meetings of the open price plan, beg to advise that it is my thought that it would be unwise to hold meetings any more frequently than you are now doing. I realize that this jumpy and erratic market is very confusing. However, we are on an ascending market and we must not put our association in a position where it can even seem that our activities have any relation to the increase of price. I, therefore, strongly recommend against more frequent meetings. We must indeed be like Cæsar's wife—utterly above suspicion.

Attention is called to this correspondence because it shows that the membership of the association were anxious to hold frequent conferences and to engage in concert of action up to the very verge of what their counsel would construe the law to be, and that it was realized that they were along in the neighborhood of a line which should not be crossed.

Attention is called by appellants to the fact that some members of the association, especially Mr.

Ritter, realized that the prices were soaring too high, which might result in the public's seeking substitutes for lumber and in the engendering of ill feeling against the manufacturers, and an effort was made to restrain the activities of the other members in boosting prices. However, this effort but places in a stronger light the evil practices of the association as a whole. Not even a selfish motive, such as a threatened danger of the character stated, could restrain them from extorting from the public the top prices.

Mr. Ritter himself seems to have finally ceased his efforts of reform, and joined in the general revelry by getting what he could from the particular individual to whom he was selling. Thus it appears from the report of January 31, 1921, that he sold 2,000 feet of Fas. ⅝ plain poplar for shipment into the Baltimore territory at $91.25 per thousand, while he sold the same quantity of the same lumber for shipment into the New York territory for $123.75, making a difference in the two sales of $32.50 per thousand. (R., Vol. I, orig. p. 130.)

ARGUMENT.

I.

"COOPERATIVE" OR "OPEN PRICE" ASSOCIATIONS.

The foregoing facts speak for themselves, and we will not undertake here to reargue the significance of those facts, but refer for such argument to pages 50 to 73 of the brief and argument heretofore filed by

the Government. However, we will consider some of the fundamental principles here involved.

This case for the first time presents directly for the consideration of this court the practices of those organizations which are known as "Open Price Associations." This court had condemned in numerous cases brought to enforce the Antitrust Act of 1890 all forms of combinations which directly restrained, and all acts which tended to directly monopolize interstate and foreign commerce. It had specifically held unlawful agreements fixing rates between naturally competing railroad companies; combinations of such companies under one management; the absorption by one corporation engaged in the production of an article moving in interstate commerce of other corporations engaged in the production of the same article; agreements between manufacturers producing, or mercantile concerns engaged in the selling of, the same articles, whereby prices were fixed or goods were diverted from one channel of commerce to another; and black lists and other devices used by members of associations to compel certain articles of commerce to be handled by them. Astute business men then set about to devise some scheme so adroitly formulated that it would accomplish the same results as had been accomplished by methods which had been thus condemned, and yet not be violative of the provisions of the Antitrust Act as it had then been construed in any specific case; and the result was the invention of the plan of so-called "Open Competition," and the "Open Price Associations." And the

conditions of the industrial world are such, and the literature upon the subject so abundant, that the court is justified in taking judicial knowledge of the fact that these associations are so numerous and so extensively organized as to threaten an economic revolution.

It can hardly be believed that when the "plan" was originally suggested its operation was thought to be legal. Its basic principle is that of cooperation; and Mr. Eddy, who did more toward promulgating the plan than any other person, openly declared that—

> the very *theory* of our *antitrust laws* is that they *suppress cooperation*, and, by encouraging competition, promote the widest possible fluctuation in prices—for the supposed benefit of the consumer who is—the law forgets—first of all a producer. (Eddy's The New Competition, 4th edition, p. 28.) [All italics in quotations from this book are the author's.]

And again, after declaring that—

> The country has reached the parting of the ways. It must make its choice, and make it intelligently—either the *competitive* or the *cooperative* basis—

he says:

> We are in course of making this choice; Congress is debating constructive legislation to supplement or take the place of the Sherman law, which is purely destructive in its intent. (Id. pp. 35–36.)

In fact, the whole book breathes the bitterest antagonism to the Antitrust Act; and it is not positively claimed that an association engaging in the practices there advocated would not be operating in violation of law. Thus on page 124 the author after stating that it might be argued that statements of prices amount to indirect promises that the prices named would not be changed, which prices might be inferred from results, says:

> To go a step further—it probably would not be illegal for men to meet in good faith and compare costs and prices for the purpose of preventing, if possible, disastrous competition and of getting reasonable returns for their products, but to what extent such frank and straightforward efforts to do only what is reasonable and fair from a sound business point of view will be held legal in this country depends upon the application the courts may make of the general principles laid down in the Standard Oil and Tobacco cases.

It has been recognized in every decision of this court construing the Antitrust Act that its object was to preserve competition, as it was and has been defined by Adam Smith and all political economists since his time. Such competition does not mean what Mr. Eddy and his followers are pleased to call "*cutthroat competition.*" In fact, he appears to have had an entire misconception of the objects of the Antitrust Act. There is hardly a practice mentioned by him as illustrative of cutthroat methods of competition, and which he claims the antitrust law was

designed to perpetuate, that has not been condemned by the courts as violative of that law. The object of the law was to secure and perpetuate *fair* and *honest* competition by the elimination of *fraudulent* and *unfair* practices. But competition was intended to be *real* and not *fake*. The practice of these "open price associations" is denominated by Eddy and his disciples as the "new competition," or "open competition," and their slogan is "cooperation." There is no such thing as "new competition" in the sense here used. True competition has been the same as long as men have engaged in trade; and this Eddy plan is rightly spoken of as "cooperation"; and the meanings of the two words "competition" and "cooperation" in political economy are directly opposed to each other. "Competition" in commerce and economics is thus defined by Webster: "The effort of two or more parties, *acting independently*, to secure the custom of a third party by the offer of the most favorable terms;" while "cooperation" in economics is defined as, "the association of a number of persons *for their common benefit; collective action* in the pursuit of *common* well being, esp. in some industrial or business process." And Eddy defines this "new competition" thus: "Rivalry—competition in its broadest significance—is the *earnest, intelligent, friendly striving* of man with man to attain results *beneficial to both.*" (P. 18.) Members of an association may strive together to attain results beneficial to all, but certainly such striving would not partake of the nature of an effort *by each acting independently* to

secure the patronage *for himself individually* of a third party. In fact, the word "competition" has no place in a description of the activities of these associations. As the history of their development and the literature promoting their adoption show, their chief design was to destroy *competition* and to substitute therefor *cooperation*.

Men engage in business, not for amusement, but for profit, and they will not ordinarily devote their time to the promotion or maintenance of a scheme which will not increase their profits. Of course, more accurate knowledge as to methods of conducting their business may aid them in reducing their expenses, and thus increase their profits; but when one uses a method which requires less expense than the methods of his competitors he is usually not anxious to secure its adoption by them. Undoubtedly there are activities in which all may naturally engage in concert in an effort to secure mutual benefit, but those activities have nothing to do with competition between the individuals so engaged. For illustration, it would be to the advantage of all hardwood lumber manufacturers for the use of such lumber to be extended into new fields, or for such legislation to be passed or treaties made as will promote the exportation of such lumber. And it would be to the mutual advantage of the manufacturers of one section to secure a reduction of rates to the centers of consumption, while the manufacturers of another section might well act in concert in opposition to such reduction in order to avoid

the more acute competition which it would produce. Concerted action along such lines can be easily understood and create no suspicion. *But when men selling in the same market and seeking the same customers join hands in doing the very things that real competitors never have done—things which are directly and fundamentally opposed to every element of competition as defined and understood by all political economists, and as understood by Congress when the antitrust law was passed, such conduct naturally excites suspicion, and is deserving of the closest scrutiny.* The ultimate aim of such conduct upon the part of each individual is to increase his profits, and as profits depend upon the price of the product, his aim is to get more money for his output than otherwise he would receive. In fact, this is not denied by the promoters of the "Open price plan"; but they say it is accomplished by stabilizing the price, which means that the price will be made nearer constant at an average price higher than would be the average if the market were not thus stabilized.

Now, what is the natural result of such a scheme as is presented in the evidence in this case—that is, by the weekly exchange of the prices of all sales made, figured at a certain point; of monthly reports of all stocks on hand, sold and unsold, of all raw material on the yard, and prospective production; of the distribution of a monthly discussion engaged in by each member relating to the prospects for future business, and especially to prices, each being animated with a desire to have his product bring the highest price

possible; of a letter prepared by the statistician presenting a summary of the situation, if not in a false light, at least in the light the most favorable facts will permit; and of frequent meetings where every element entering into production and prices are personally discussed and views are freely exchanged as to production and prices? In other words, where everyone exposes to every potential competitor every detail of his entire business, and especially those relating to prices of their common product, and then meet and personally discuss those details, is it possible for any real competition to exist among persons so affiliated? Certainly not. If real competition should develop, the organization would immediately fall to pieces, because every member who had been undersold would feel that he had been wronged, and thereafter would look upon such competitor as an enemy. The very existence of such an organization depends upon the implied, if not formal understanding, that every member will respect the supposed rights of all others, that no member will commit an act which will result in injury to any one or all of the other members, but that each will so conduct his business that it will result in the mutual benefit of all.

The operation of this plan is far more efficacious in controlling prices than an actual agreement fixing prices between the same persons. Every individual entering into a price-fixing agreement knows that it is unlawful and void, and is not only indifferent to its observance, but possibly uses it as a means of

deceiving his competitor; but by this plan no deception is possible. If one cuts the price, every member in a few days is informed of that fact, and he is conscious of the secret, if not the open condemnation of his associates. This superiority over a formal contract fixing prices was by Mr. Eddy regarded as one of the virtues of the system. On page 126 of "The New Competition" he says:

> 'The theoretical proposition at the basis of the open price policy is that—
>
> *Knowledge regarding bids and prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.*
>
> No agreements to maintain prices are necessary; they are not only unnecessary but detrimental. They do not work satisfactorily in countries where not forbidden by law; they have never worked here. They give rise to more distrust, more bad feeling than any amount of cut-throat competition, and, in so far as they are effective for a time in advancing prices, they are direct inducements to others to enter the business and so, in the end, make competition all the keener.

It is claimed that there is a vital distinction between a practice of exchanging price lists or of members of an association stating to each other the prices they intend to charge and their exchanging full information as to past transactions, including the exact prices which they have charged for every sale. Mr. Eddy suggests such a distinction just previous to the above quotation, but the suggestion is followed by this wholly inconsistent statement:

> The *open price* plan is the frank statement of actual transactions, and *actual transactions* interest competitors far more than assurances regarding future—the facts speak for themselves, the assurances—irrespective of their legality—are seldom kept.

Such a distinction is suggested by counsel in this case, and it is pointed out that although the plan originally contemplated an exchange of price lists, the distribution of such lists was after a time discontinued. (Affidavit of Gadd, Vol. II, p. 1107.) But how can an exchange between the members of information as to the prices they intend to charge in the future be more effective than an exchange of exact information as to what they have actually charged in the past? In fact, the latter information is far more reliable and serves as a much better guide for the future conduct of the membership. Simple statements as to what one intends to do are unreliable, as they may be, and generally are, deviated from; but an exact record of what one has done up to within a few days of the exchange of information is a true index as to what his conduct for the future will be. As stated time and again in "The New Competition," it is the exchange of information as to *real facts* that is most effective; and not expressions of intentions, or even agreements as to what the parties concerned will do.

Moreover, there is a special reason why the exchange of price lists by the membership of the association here in question was discontinued. The mem-

bers in fact quit putting out price lists. They were not only unnecessary but were impossible. The advance in prices was so rapid that by the time a price list could be printed it was entirely out of date, and the only method of keeping informed as to what the membership were charging was a continual exchange of information as to past transactions. In fact, no member could make a reliable statement as to what he expected to do. The general intent was to charge everything the market would bear, but what prices could be obtained no one knew.

Manifestly, the results of the operation of this open-price scheme are different when applied to different industries, and under different economic conditions. This court will become fully informed as to its various effects unless the disposition of this case be such as to render future actions of this character useless. By considering the motives which control human conduct, we can reach a reasonably correct conclusion as to what some of the results have been and will be, if the activities of these associations are not restrained, under the varying conditions incident to the industries and commerce of this country; and a few of such conditions and the results of this scheme when practiced thereunder will be stated for illustration:

1. When the product manufactured has but one or a very few grades, the cost of production does not greatly vary and the capacity of the factories is about equal to the demand, and therefore the range of prices would naturally not be very great.

Under such circumstances prices are on a dead level and every semblance of competition disappears. Furthermore, the trade is distributed among the producers in almost the exact proportion of the capacity of the factories, and there is practically no growth of the smaller factories, and but few additional factories dare enter the field. This naturally results from the continuous association of the members, their complete knowledge of each other's business, and the anxiety of every member to avoid every action which might subject him to any criticism of his associates. The membership, being combined for their mutual benefit, look upon themselves as allied against the public generally, from whom they reap their profits, *and against all outsiders;* and hence such an organization under the circumstances stated will, without any formal agreement, but by a tacit understanding and uniform course of conduct, fix a price at such a level that they will obtain at least a handsome profit, one considerably greater than they would realize in the absence of such an association, and will maintain the price at such level.

As heretofore stated, the special virtue claimed for these "open price associations" is that they stabilize the market to the benefit of both the members of the association and their customers; but

under the conditions here described, no such stabilizing influence is necessary, because the market is sufficiently stable under the operation of usual economic laws. For illustration, take the milling industry. There is such little variation in the prices of wheat and the cost of milling that the prices of flour over a considerable territory vary but little. What advantage could the public derive from an association of millers wherein they would exchange all information about production and about every transaction had, including the grade of the flour sold and the price received? Such an organization would mean a uniform price of flour very materially in excess of prices fixed by the law of supply and demand operating without the influence of personal contact and the mutual knowledge of each other's business.

2. Where the capacity of the factories belonging to the association are much in excess of the demand.

Under such circumstances if the law of supply and demand prevailed without restraint, prices would materially decrease, and those factories which are operated at the greatest expense would be forced to suspend; but such is not the result when the industry is controlled by an open-price association. They are organized for mutual benefit, and for the preservation of them all; and one of the principal purposes of these associations, as is shown by the literature upon the subject, is to maintain prices at such a point that *all the members*, even the one whose cost of production is the greatest, may not

only exist, but make some profit. In order to accomplish that result it is necessary to either divide the work between the factories in proportion to the demand, or to divide the factories into groups and designate during what period of time the different groups may operate. It may be insisted that neither of these things can be done without a positive agreement; but it is surprising what can be accomplished by mere suggestions and tacit understandings among those who are seeking an end beneficial to them all.

3. When the demand for the product manufactured by the factories is decreasing, and the price is falling.

It may be, and probably would be, impossible under such circumstances for the members of the association to fully maintain prices; but undoubtedly by supplanting the general law of supply and demand by cooperation they can greatly hamper the operation of that law and retard the decline. This may be and naturally would be accomplished, first, by a curtailment of production, each member tacitly understanding—such understanding being obtained from an open discussion and exchange of views upon the subject—that the output should be reduced one-half, or more or less, of the full capacity of his factory; and, second, from the very fact that there is a continual exchange of prices among the members of the association, for each member naturally endeavors to obtain the highest price possible, and is spurred on in this

effort by his anxiety to demonstrate to his associates that he is not cutting prices, but is making every effort to maintain them for their mutual benefit.

4. Where the demand is increasing, and the market is rising.

We have an illustration in this case of the operation of one of these associations under the condition here described; and the conduct of the membership of the association was as certain and the effect as inevitable as can be any action and its effect which are dependent upon human motives. The Government does not insist that the exorbitant and unheard-of prices which were being charged and received for lumber when this bill was filed were wholly the result of the operations of this association. Undoubtedly the shortage in lumber resulting from the climatic and labor conditions and the general industrial conditions of the country had much to do with the increase in prices; but it is equally obvious that the conduct of the present appellants, operating through the association here attacked, greatly stimulated the efforts to obtain extortionate prices, and was the approximate cause of a very large per cent of that increase.

If this and other lumber associations had not been in existence, and manufacturers had not had information except from general sources as to the amount of production, the conditions upon which future production depended, the sources from which demands for lumber emanated, and the prices at which

lumber was selling, and had not been stimulated to increase prices by a continuous exchange of views in writing and discussions in person as to future production and demand and the unparalleled opportunity to obtain unprecedented prices for their lumber, it would have been impossible for prices to have approached the altitude which they reached. It can not be conceived that appellants' activities as here proven were for an innocent purpose, and not designed to obtain from the public the very highest prices for lumber. A more effective method of doing so could not possibly have been devised. It was much more effective than if in January, or even in July, 1919, appellants had entered into a written agreement fixing prices of lumber, and had faithfully observed that agreement; because then they would not have dared name such prices as were subsequently charged. Why, in the letters of the manager of statistics, was there continual emphasis laid upon the deficiency of stock on hand and the conditions which, it was represented, would inevitably curtail production in the future? Why the pointing out of the sources from which the demands were coming, and prophesying greatly increased demands from those and other sources in the future? Information upon all those subjects was found in the reports distributed among the members, yet it was in those letters, not only condensed and repeated, but was in fact overstated. And why the weekly interchange of views in writing, each expressing a most confident belief in the future; and then their frequent meet-

ings to add inspiration by a face to face discussion of the very subjects upon which prices of lumber depended? And especially why, at the very time when prices were soaring and the demand increasing, and both the stock on hand and production were away below normal, did this secretary-manager pause to sound the warning against increase of production by the operation of their mills at night, and thus killing the goose that was laying the golden egg? There could have been but one motive that prompted all these activities, and that was to bull the market and maintain it at the highest point to which it could be driven. It is true that now and then a voice was faintly raised in protest, but it was quickly drowned by the chorus calling for still higher prices.

In the light of this record, the desire expressed in the letter written by the secretary to the association's general counsel, for the members in the Memphis territory to meet once a week and get prices up to the minute *in order that they might "stabilize" the market*, was manifestly a mere pretense. They had never shown the least disposition to stabilize the market, though they had been receiving the information about production and prices for months; but to the contrary, they had continually used this information as a means for boosting the market. The way to stabilize that market was for the producers of lumber to hold their prices down, for each to make an estimate of his cost of production and add to it a reasonable profit, and for each to run his mill as nearly as possible at its full capacity; but to the con-

trary, the whole effort was to aid each other in getting all the public could possibly pay; and instead of the market being stabilized, it ran completely away. In a sense there was active competition between the members of the association; that is, each was endeavoring to get higher prices for his lumber than his associates were getting, and if some members appeared not to be keeping up with the procession, their attention was adroitly called to the fact, as was done at the meeting of January 15, 1919, at Jackson.

II.

TO SHOW A VIOLATION OF THE STATUTE, IT WAS SUFFICIENT TO PROVE CONCERTED ACTION PURSUANT TO AN ACTUAL OR TACIT AGREEMENT, WHICH WOULD NATURALLY AND DIRECTLY CURTAIL THE PRODUCTION OR INCREASE THE PRICE OF LUMBER MOVING IN INTERSTATE COMMERCE; AND IT WAS NOT NECESSARY TO PROVE A FORMAL AGREEMENT TO EITHER REDUCE PRODUCTION OR TO FIX OR INCREASE PRICES OF SUCH LUMBER.

Some emphasis is made by appellants upon the fact that no agreement, either formal or tacit, is proven to *fix* prices, or to make the prices of lumber uniform. This is wholly immaterial, as, if by agreement, or concert of action amounting to a tacit agreement, prices were *increased*, such action was as much a violation of the statute as if it had been agreed that the prices should be uniform at a fixed scale. It certainly can make no difference whether the advanced prices be uniform or widely divergent, as the restraint upon commerce is as pronounced in one case as in the other.

Upon the proposition above stated in the headlines the case of *Eastern States Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600, 608, 612) is directly in point. The object of those associations was to prevent wholesalers from competing with the retailers. That was accomplished by distributing among the membership a list of wholesalers who sold directly to consumers. As to the purpose and effect of this conduct the court said:

> True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed, this purpose is practically conceded in the brief of the learned counsel for the appellants:
>
> "It was and is conceded by defendants and the court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of course, the very object of the defendants in circulating them."
>
> In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to

> have the natural effect of causing such retailers to withhold their patronage from the concern listed.

And again:

> But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

That concerted action which is not the result of a formal agreement may violate the antitrust statute is also recognized in *United States* v. *United States Steel Corporation* (251 U. S. 417, 444), where this court said:

> * * * Monopoly, therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of of them, it may be, violations of the law, but transient in their purpose and effect.

It is useless to multiply authorities in support of the proposition thus stated by Judge Morton in

United States v. *Piowaty* (251 Fed. 375, 377), which is cited by appellants, to wit:

> The necessary agreement or understanding may, of course, be tacit, as well as expressed; its existence may be inferred—and, even in criminal cases, often is inferred—from the conduct of the parties. (*Eastern States Lumber Ass'n* v. *U. S.*, *supra*; *U. S.* v. *Naval Stores Co.* (C. C.), 172 Fed. 455, 460.) Concert of action among the members of an association, in particulars such as are set forth in this indictment, strongly suggests agreement; but if that is the construction which the prosecution places upon the defendants' conduct it ought to be so stated.

III.

THE INCREASE IN THE PRICE OF LUMBER AND CONSEQUENT RESTRAINT UPON INTERSTATE COMMERCE WERE THE DIRECT, AND NOT THE INCIDENTAL, RESULT OF BOTH THE FORMAL AND TACIT AGREEMENTS BETWEEN APPELLANTS.

In the first place, there is no question that appellants positively and formally agreed to the plan which was put into effect. That is, they agreed upon the exchange of information through the system of reporting by the members to the statistical secretary and by him to the members, and the discussions in writing and verbally in the meetings as heretofore described; and a natural and inevitable result of carrying out this plan or agreement was the curtailment of production and an increase of the price of lumber. In the second place, the fact that there was a general concert of action upon the part of all, or practically all, of the appellants in raising the price of lumber

under the circumstances proven, establishes a tacit agreement that the information received under the plan would be used by the members as a means to accomplish that end.

If production was reduced, or the prices of lumber moving in interstate commerce were increased as a result of either the formal or tacit agreement, such effect was the immediate and proximate result of such agreement within the meaning of the antitrust law. Upon this proposition, as upon the preceding one, the case of *Eastern States Retail Lumber Dealers Association* v. *United States*, supra, is conclusive. There the plan upon which the members of the association formally agreed was to secure information as to, and prepare a list of, the wholesalers who sold directly to consumers, and to distribute that list among the membership of the association. Such action corresponded exactly to the plan for procuring from and distributing among the membership the information with reference to production and prices agreed upon by the appellants in this case. The common intention or agreed purpose to prevent, by the distribution of the list, the wholesalers from selling lumber to the consumers, and thus compelling it to pass through the retailers, was there inferred from the circumstances incident to the issuance of the list, and the effect which would naturally result from its distribution; which effect the court thus described:

> The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from

entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe* v. *Lawlor*, supra.

The evidence of an intention and agreement here to raise prices is stronger than was the evidence from which the inference of intention and agreement to divert the flow of commerce in lumber was there drawn. Here there is proven, not only the distribution of the information, but the strong emphasis laid upon it by letters and personal discussion, and *the positive statements by a large number of members that the information was so used.* If there the restraint upon interstate commerce by diverting its flow was

the direct result of the operation of the plan used, certainly here the restraint of such commerce, either by the curtailment of production, or by raising prices is the direct result of the operation of the plan here proven.

As the contention that the restraint upon interstate commerce by the operation of the plan here shown, is not direct, but remote and incidental, is somewhat stressed by appellants, a few of the cases bearing upon the subject will be considered.

The conspiracy of the boycott and the carrying out of the conspiracy condemned in *Loewe* v. *Lawlor* (208 U. S. 274, and 235 U. S. 522) were more remote from the result than were the adoption and execution of the plan here proven. There the action of the defendants operating pursuant to the conspiracy was directed immediately upon third parties—that is, upon customers of plaintiff; and the result depended upon the effect upon such parties. Here the result depended upon the volition of the defendants themselves, acting upon the information obtained from and representations made by other members.

In point of proximity of cause to effect this case is parallel with the line of cases beginning with *United States* v. *Jellico Mountain Coal & Coke Company* (46 Fed. 432), wherein the offense consisted of an agreement between the defendants fixing prices.

A case showing that the conspiracy to be unlawful may not have an immediate effect, but that it may be in fact uncertain and speculative, is *United States* v. *Reading Company* (226 U. S. 324, 348, 351). The action there condemned was the procuring by the defendants of the control by stock ownership of the Temple Iron Company. That company was previously controlled by independent coal operators, who contemplated through it the construction of a line of railroad which would be a competitor of the defendants. A large subscription of stock had been taken, the line of road in part surveyed, and a part of the rights of way procured, and a large quantity of steel rails contracted for, but no work had been actually done in constructing the line. How many vicissitudes might intervene which would prevent its construction, of course, did not appear; yet this court said:

> The projected competing railroad was undoubtedly a good-faith proposition and held out promise to independent coal operators not only of the prospect of competition in transportation from the mines to tidewater, but the possibility of selling their coal either to the controlled coal companies defendant at better prices or to the consuming public at tidewater in competition with that of the controlled coal companies. But if we assume that its construction was doubtful, the result must be the same as characterizing the purpose and design of the concerted action of the defendants. They were so far convinced of the

> threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

There is a line of cases relied upon by appellants which turned upon the question whether the conduct complained of directly or incidentally affected interstate commerce. An early case involving this question was *Hopkins* v. *United States* (171 U. S. 578). That action sought the dissolution of the live-stock exchange at Kansas City, and it was shown that the exchange fixed a commission for selling live stock in Kansas City, prohibited the employment of agents to solicit consignments except upon a stipulated salary, forbade the sending of prepaid telegrams or telephone messages with information as to the condition of the market, and provided that no member should transact business with any person violating the rules and regulations, or with an expelled or suspended member after notice of such violation. As said by this court in *Swift & Company* v. *United States* (196 U. S. 375, 397):

> All that was decided there [in the Hopkins case] was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce.

That is, the court held that the defendants were not engaged at all in interstate commerce, and that the effect of their rules upon interstate commerce was

incidental and not direct. A careful study of decisions involving a like question will show that the line of distinction is not so sharply drawn in the later cases. *Montague* v. *Lowry* (193 U. S. 38) was an action for damages brought against the members of an association composed of manufacturers of and dealers in tile, mantels, and grates. The dealers were all residents of California, while the manufacturers were nonresidents. The agreement between the members of the association was that the dealers would not purchase materials from manufacturers who were not members, and would not sell unset tile to anyone not a member for less than the list prices, which were 50 per cent higher than the prices to members; and the manufacturers agreed not to sell to any other than members. The plaintiffs were dealers in tile, mantels, and grates, in San Francisco. It was held that, although the sales of unset tile were within the State of California, yet an agreement of manufacturers without the State not to sell to anyone but members was part of a scheme which included the enhancement of the price of unset tile by the dealers within the State; and the whole thing was so bound together that the transactions within the State were inseparable, and became a part of a purpose which when carried out amounted to a combination in restraint of interstate trade and commerce. In *Swift* v. *United States* (196 U. S. 375, 398) defendants endeavored to have the court apply the principle decided in the *Hopkins case*, on the ground that both

the purchases and sales made by the defendants were local, and the interstate commerce feature of the business was incidental; but the court said:

> It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated.

But these cases have no special bearing here, because there is no question that the appellants' lumber was moving in interstate commerce; and if their conduct resulted in any restraint at all, such restraint was upon interstate commerce. There is necessarily a distinction between agreements which by their nature are local in their operation

and but incidentally affect interstate commerce, and those agreements which directly pertain to such commerce and are not local in their nature. Where the agreement necessarily relates to interstate commerce the courts have never drawn a nice distinction as to whether or not the effect is immediate, or in a measure remote. The primary question is whether the effect is a natural and expected result of the cause; and if so it is prohibited by the statute, though there may be intervening agencies through which the cause passes. Such is not true with reference to an agreement which is local in its nature. The primary question then presented is whether it directly affects interstate commerce; and if it does not, Congress was without power to legislate with reference to the matter, and hence the Antitrust Act can have no application thereto.

Appellants also cite as authority *Anderson* v. *United States* (171 U. S. 604); and *Chicago Board of Trade* v. *United States* (246 U. S. 231). But neither of those cases has any material bearing on the questions here presented. The former case was an attack upon the Traders' Live Stock Exchange of Kansas City, the members of which were engaged in buying cattle; and the regulations complained of were those that prohibited the members from dealing in any way with those who were not members of the exchange. It was held by the court that under the facts proven, the purpose of the agreement was not to regulate, obstruct, or restrain commerce, but that it was entered into with the object of properly

and fairly regulating the transaction of the business in which the parties to the agreement were engaged. In the latter case, the legality of a rule of the Chicago Board of Trade was questioned, which prohibited members of the board from purchasing or offering to purchase during the period between the session of the board termed the "Call" and the opening of the regular session of the next business day grain "to arrive," at a price other than the closing bid at the "Call." It clearly appeared under the facts proven, that the object and effect of the rule was to promote interstate commerce and not to restrain it. And in pointing out the true test of the validity of a regulation the court said:

> The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the antitrust law. But the legality of an agreement or regulation can not be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied;

> its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences (p. 238).

So in the present case, if the evidence shows that the plan adopted and as operated by the appellants was not designed to and did not have the effect claimed by the Government, but its effect was to promote commerce, then of course the Government's bill should be dismissed; but it is insisted that exactly the contrary intent and effect is conclusively proven.

For the foregoing reasons, and others stated in the Government's brief filed on the former hearing, the decree of the court below should be affirmed.

JAMES M. BECK,
Solicitor General.
JAMES A. FOWLER,
Special Assistant to the Attorney General.

OCTOBER, 1921.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921,

No. 71.

AMERICAN COLUMN & LUMBER CO., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

APPELLANTS' REPLY TO SUPPLEMENTAL BRIEF OF THE UNITED STATES.

I.

Changes in the Original Plan.

In setting forth the plan of operation of the association as originally proposed the Government fails to note the changes which were made. That some of the features of the plan as originally proposed were never put into effect, and that certain others, although initiated, were soon abandoned, may not alter the legal

effect of the plan, but nevertheless, the changes should be noted in order that the Court may have a correct understanding of the facts as shown by the record.

While it was originally contemplated that the Stock Reports should show the stocks on hand of each member, as actually made up and distributed they showed only the total stocks of all the members of each kind, grade and thickness of hardwood lumber. (Gadd, 2 Rec. 1101.)

The names of customers were *not* included in the Sales Reports. (Gadd, 2 Rec. 1107.)

No reports of shipments were ever made. (Gadd, 2 Rec. 1107.)

The practice of distributing the price lists of members was soon discontinued (long prior, indeed, to January, 1919, when the alleged conspiracy to enhance prices is supposed to have originated), because many of the members did not issue price lists regularly. (Gadd, 2 Rec. 1107.) Right here, we wish to point out that even during the short time that price lists were distributed there were no consultations or exchanges of view amongst the members as to what their prices should be.

The proposed table of differentials for the purpose of comparing different grades and dimensions with the standard grades and dimensions, referred to on page 18 of the Government's supplemental brief, was never issued; but the Sales Reports themselves noted the fact when lumber sold was not of a standard grade.

After stating that the plan was adopted on January 29, 1917, the Government's supplemental brief then states that the first Sales Report was for the week ending January 25, 1919. This is a mistake. The is-

suance of these reports began soon after the adoption of the plan in 1917, and eighty-eight of them had been issued prior to January, 1919. The Government was not interested, however, in that period. It selected a time when prices were rising in order to give color to its theory that the purpose and effect of the plan was to enhance prices.

II.

Exchange of Information of Market Conditions Not Inconsistent with Competition.

The supplemental brief of the Government states:

> "It has been recognized in every decision of this Court construing the Anti-Trust Act that its object was to preserve competition, as it was and has been defined by Adam Smith and all political economists since his time." (P. 153.)

We do not dispute this. But political economists have never considered it inconsistent with a competitive market for either sellers or buyers to have full information of the facts which determine the conditions of supply and demand, such as stocks on hand and the prices at which sales are being made. On the contrary they hold that the more widely such facts are known the nearer the market approaches perfection. Thus Jevons states:

> "It is of the very essence of trade to have wide and constant information. A market, then, is theoretically perfect only when all traders have perfect knowledge of the conditions of supply and demand, * * *.

> "So essential is a knowledge of the real state of supply and demand to the smooth procedure of trade and the real good of the community, that I conceive it would be quite legitimate to compel the publication of any requisite statistics. Secrecy can only conduce to the profit of speculators who gain from great fluctuations of prices." (The Theory of Political Economy, 3rd Ed., 1888, pp. 87-88.)

And Adam Smith himself points out that where prices have risen because demand has outrun supply the surest way to bring them down is by promptly making known the existence of the strong demand and short supply to all who produce the article. He says:

> "When by an increase in the effectual demand, the market price of some particular commodity happens to rise a good deal above the natural price (*i. e.*, cost of production) those who employ their stocks in supplying the market are careful to conceal this change. If it was commonly known, their great profit would tempt so many new rivals to employ their stocks in the same way, that, the effectual demand being fully supplied, the market price would soon be reduced to the natural price and for some time even below it." (Wealth of Nations, 6th ed., 1791, Book I, ch. 7, p. 90.)

The application of this principle in the present case is aptly shown by the testimony of M. W. Stark:

> "A study of the sales report shows in what territory the lumber is in most demand and commanding the highest prices. This stimulates the members to give attention to their selling to that territory and to direct supplies to that territory from points which under ordinary conditions did

not compete in that territory by reason of difference in freight. Competition and supplies are thus increased at the points most needed." (2 Rec. 1260.)

Present-day opinion is to the same effect.

The Federated American Engineering Societies has on the press a book entitled "Elimination of Waste in Industry," the foreword of which was written by Secretary Hoover. At page 30 of this book there is the following:

"Trade organizations should collect and make public trade information, including current data on production, stocks on hand, consumption, the general price levels of essential commodities, and statistics of active and idle plant capacity. Such information would make for stability and elimination of waste."

In the report heretofore referred to in our main brief, Chief Forester Greely of the United States Bureau of Forestry, dealing specifically with the lumber industry, says:

"With lumber manufacture and marketing so widely distributed, the industry has lacked a central medium for reporting price changes from day to day, like the wheat or cotton exchanges. No general and authoritative price data have been available to it, like those assembled and published by the Department of Agriculture on many agricultural products. The function of the regional lumbermen's association in assembling and distributing the prices reported on current sales has grown out of a *real need* on the part of many operators for better information about their market.

> It is a development common, in one form or another, to most of the large businesses of the country." (Pp. 65-66.) [Italics ours.]

Very recently the Department of Commerce began publishing monthly a "Current Survey of Business," including statistics of production, stocks on hand, and prices, in some of the basic industries. In the July issue the Secretary of Commerce stated:

> "To visualize the current trends of business and industry monthly, the Department of Commerce has found it necessary to condense and compile a large volume of information. These facts have been of service to the Department in its attempt to grasp the changing business conditions. It is believed they may be useful to the business public and that the figures, in some measure, will assist in the enlargement of business judgment. * * *
>
> "The basic figures used in the accompanying tables are largely those already in existence and are collected from Government departments, *trade associations*, etc. * * *" [Italics ours.]

The vital question in this case is whether the members of an industry having the characteristics of the hardwood industry may associate for the purpose of gathering and distributing at regular intervals statistics of production and of stocks on hand and of sales which have actually taken place. It should always be remembered that the reports of sales, of stocks on hand and of production involved in the present case represent actual conditions. No suggestion has ever been made that the data are manipulated.

This industry is widely scattered; its product goes

to common markets; generally speaking its units are small; the greater volume of production is marketed through well informed middlemen; unless permitted to furnish it to each other, there is no source of market information open to hardwood manufacturers, governmental or otherwise. It is in the light of these conditions that the application of the law must be determined.

III.

Competition Amongst the Defendants Not Suppressed.

The supplemental brief of the Government further states:

> "Now, what is the natural result of such a scheme as is presented in the evidence in this case—that is, by the weekly exchange of the prices of all sales made, figured at a certain point; of monthly reports of all stocks on hand, sold and unsold, of all raw material on the yard, and prospective production; of the distribution of a monthly discussion engaged in by each member relating to the prospects for future business, and especially to prices, each being animated with a desire to have his product bring the highest price possible; of a letter prepared by the statistician presenting a summary of the situation, if not in a false light, at least in the light the most favorable facts will permit; and of frequent meetings where every element entering into production and prices are personally discussed and views are freely exchanged as to production and prices? In other words, where everyone exposes to every potential competitor every detail of his entire business, and especially those relating to prices of their common product, and then meet and personally discuss those details, is it possible for any real

competition to exist among persons so affiliated? Certainly not." (Pp. 156-157.)

The defendants do *not* inform each other of every detail of their business. The information is limited to that which has a direct bearing on the conditions of supply and demand—stocks on hand, prices at which the product *has been* sold, and rate of production as compared with normal. Nor, as our main brief shows (pp. 33-35), is it accurate to describe the monthly meetings, which were attended by less than a third of the members, as "frequent meetings where every element entering into production and prices are personally discussed and views are freely exchanged as to production and prices."

But, overlooking these erroneous assumptions in the formulation of the question, this paragraph states the crucial question of fact in the case, namely, Is it possible for any real competition to exist among persons affiliated as the defendants are?

The Government answers, "Certainly not," but cites no evidence. This is a question of fact, however. It is a question of fact on which depends the guilt or innocence of men accused under the criminal law. It must be resolved, therefore, not by the assertions of counsel but by the evidence in the case. In the *Steel Case,* Mr. Justice McKenna uttered a warning against accepting assertions or deductions in lieu of evidence on a question of this kind—and there the deductions were subject to cross-examination. That warning applies with double force to like deductions of counsel. He said:

"It has become an aphorism that there is danger of deception in generalities, and in a case of

this importance we should have something surer for judgment than speculation,—something more than a deduction equivocal of itself, even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution." (251 U. S. 448-449.)

Counsel for the Government cite no evidence in support of their assertion for the very good reason that the record contains none. On the other hand there is cogent evidence that the association of the defendants in this plan for obtaining accurate information of market conditions has *not* suppressed competition among them.

First. There is the testimony of many of the most active members that they were striving to get as large a proportion of the business as they could, producing to their utmost and fixing their prices according to their own independent judgments. (Appellants' Main Br., pp. 36-37.) As before observed, this Court gave weight to like testimony of the parties to an alleged pooling agreement in *United States* v. *Reading Company.* (226 U. S. 324, 346.)

Second. There is the testimony of important purchasers of hardwood lumber, whose interest it was to expose any artificial control of prices, that they had seen no indications of suppression of competition among the defendants. (Appellants' Main Br., pp. 25-28, 39-40.) Commenting on similar evidence offered to prove the existence of competition in the *Steel Case* this Court said:

> "Besides the circumstances which we have mentioned, there are others of probative strength. The company's officers, and, as well, its competitors and customers, testified that its competition was genuine, direct and vigorous and was reflected in prices and production." (251 U. S. 417, 447.)

Referring to the same testimony Judges Buffington and McPherson in the lower court said:

> "The sworn testimony of these men, who are vitally interested in the maintenance of real competition between the Steel Corporation and its manufacturing competitors that such real competition does exist and has existed during the past ten years, cannot but carry a conviction that such is the case." (223 Fed. 55, 89.)

Third. There is the circumstance that not a single witness was produced from amongst the purchasers of hardwood lumber to complain of lack of competition among the defendants. (Appellants' Main Br., pp. 38-39.) "It is apparent," says the opinion of Judges Buffington and McPherson in the *Steel Case*, "that among this latter class (that is, the consumers of its products) we would naturally find evidence of any throttling of competition." (223 Fed. 55, 88.) Absence of such complaint was referred to by this Court in the *Steel Case* as a proper circumstance to consider. "No practical witness was produced by the Government in opposition," it said, referring to the fact that no witness testified to lack of competition. (251 U. S. 246, 248.)

Fourth. There are the "Sales Reports" themselves, which show that throughout the whole period of the

alleged combination the prices of members at any given time for lumber of the same kind, grade and thickness, varied constantly and substantially. (Appellants' Main Br., p. 42; also *Ibid.*, Appendix A.) What better evidence could there be of the existence of competitive relations between a group of traders than to find them offering the same product in the same market at varying prices, not occasionally, but constantly? Does not this meet the Government's definition of competition quoted from Webster: "The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms?" (Government's Br., p. 154.)

If it be said that such variations in the prices charged by members are not of great significance in a market where the demand was strong and prices were rising, we answer that these variations occurred throughout the whole period of the alleged combination, whereas the rising market did not begin until June, 1919. (Appellants' Main Br., Pt. I, p. 59; Pt. II, p. 232, tables.)

Fifth. There are the "Production Reports" themselves, which show some members producing to the limit of their capacity; others much less than their capacity, in some cases less than half, principally because of bad weather conditions; and others at various stages in between. (Appellants' Main Br., p. 42; also *Ibid.*, Appendix B.) If these men had not been real competitors is it not likely that those whose production was thus held down through no fault of their own would have insisted upon some sort of equalization, either through curtailment of production by their more fortunately situated associates and consequent higher prices for all, or else through a pooling of earnings?

Yet neither of these things is even hinted at, much less charged.

Sixth. There is the experience of an individual purchaser of hardwood lumber, the Brunswick-Balke-Collender Company, offered in evidence by way of illustration. This company uses over thirty million feet of hardwood lumber annually. On February 11, 1920, it asked the American Hardwood Manufacturers' Association to obtain from its members quotations on certain hardwood items. The inquiry was communicated to the membership of the association in a circular letter. The company received over thirty individual replies quoting many different prices for lumber of the same kind, grade and thickness. This was not an isolated case; similar inquiries by this company on other occasions brought similar results. (Appellants' Main Br., pp. 61-62; 2 Rec. 1393-1396.) If this is not competition, what is?

Having no evidence to support its assertion that it is impossible for real competition to exist among persons affiliated as the defendants are, the Government resorts to *a priori* reasoning. It says (continuing from where the above quotation, pp. 8-9, left off):

> "If real competition should develop, the organization would immediately fall to pieces, because every member who had been undersold would feel that he had been wronged, and thereafter would look upon such competitor as an enemy. The very existence of such an organization depends upon the implied, if not formal understanding, that every member will respect the supposed rights of all the others, that no member will commit an act which will result in injury to any one or all of the other members, but that each will so conduct his business that it will result in the mutual benefit of all." (Supplemental Br., p. 157.)

Be it so. The very conditions here mentioned as indicative of real competition, and, therefore (so the argument runs), impossible of existence where there is such an association as that of the defendants', *did* exist in the present case. As the evidence just summarized shows some members were constantly underselling others. The Government says, and rightly, that in an association organized for the purpose of suppressing competition such a thing would have produced an enmity between the members that would have caused the association to fall to pieces. But no such result followed in this case. Again, at the same time that the production of some of the members was kept down because of excessive rainfall, others were producing to the limit of their capacity with no provision for equalization of earnings. That is not conducting one's business so that it will result in the mutual benefit of all, which the Government rightly says is essential to the continued existence of any association organized to suppress competition. Still again, some of the leading members [1] were publicly working in collabora-

[1] Among such members was Mr. Ritter, of whom the Government speaks as follows: "Mr. Ritter himself seems to have finally ceased his efforts of reform, and joined in the general revelry by getting what he could from the particular individual to whom he was selling. Thus it appears from the report of January 31, 1920, that he sold 2,000 feet of Fas. 5/8 plain poplar for shipment into the Baltimore territory at $91.25 per thousand, while he sold the same quantity of the same lumber for shipment into the New York territory for $123.75, making a difference in the two sales of $32.50 per thousand. (R., Vol. I, orig. p. 130.)" (Supplemental Br., p. 150.)

The Sales Report which the Government cites shows that the sale in the New York territory carried the figure "1" in a circle, which referred to a footnote, "828." That meant that this particular lumber was surfaced on *two* sides—dressed lumber. The sale in the Baltimore territory also carried a footnote, indicated by the figure "3" in a circle, which showed that the lumber which was the subject of that sale was from 7 to 17 inches wide, stained, special grade, and not surfaced at all. In other words, it was rough and discolored lumber, and therefore, inferior to the standard grade lumber which was the subject of the sale in the New York territory.

tion with the Secretary of Commerce and other officials of the Government from January until May, 1919, on a plan to *reduce* the prices of all basic commodities, including specifically lumber. (Appellants' Main Br., pp. 37-38.) One of these members announced at a group meeting, "The prices of all basic commodities must come down to some proportional basis as in normal times" (*Ibid* p. 38); another publicly advocated lower prices for hardwood lumber, and to that end advised customers that it was their *duty* "to buy no more lumber than is absolutely required" (*Ibid* p. 38); another deliberately held his prices below the market level. (Ritter, 3 Rec. 1267.) This sort of thing says the Government, and rightly, would be regarded as inimical in an association for the suppression of competition and the enhancement of prices. Yet, here, there was no protest or criticism whatever from the other members.

So, therefore, the test proposed by the Government equally with the evidence in the case shows that the plan devised by these defendants for keeping themselves informed of the conditions of supply and demand has *not suppressed* competition between them.

IV.

Defendants Lack the Power to Control Prices.

The supplemental brief of the Government discusses the effect upon prices of associations of traders for the purpose of exchanging information relating to supply and demand under four different sets of trade conditions. (Pp. 161-167.) The first three cases are purely

suppositious. The deductions stated are not supported by any evidence in the present record and if they are supported by any recorded experience outside the present case no reference thereto is made.

The fourth case, "Where the demand is increasing and the market is rising," represents the condition of trade during the period covered by the bill in the present case. The brief states that the extraordinary rise in the price of hardwood lumber during this period illustrates how the practice of exchanging information of market conditions operates when demand is increasing and the market is rising.

We have elsewhere shown that all the witnesses, not only hardwood manufacturers but also buyers and users of hardwood who had to pay the increased prices and whose interest it was to expose any artificial control had there been any, testified that the rise in prices during this period was not the result of any artificial control but of an extraordinary combination of natural causes, and that the Bureau of Forestry after full investigation of the facts under a Senate Resolution has made an official report to the same effect. (Appellants' Main Br., pp. 24-30.)

The point we wish to make now, however, is that, taking at its face value this discussion in the Government's brief of the effect upon prices of associations for the exchange of market information, it all proceeds on the theory that the membership of the particular association embraces a sufficiently large proportion of the industry to control the price.[1] In the present case,

[1] For example it is stated at page 161: "Hence such an organization under the circumstances stated will, without any formal agreement, but by tacit understanding and uniform course of conduct *fix* a price at such a level that they will obtain at least a handsome profit, one considerably greater than it would realize in the absence of such an association, and will *maintain* the price at such level."

however, the mills exchanging such information produce less than a third of the total hardwood output of the United States. (Testimony of Franklin H. Smith, Ex. A, 3 Rec., 1728.)[2]

Control of hardwood prices did not rest, therefore, with the members of this plan. This is further evidenced by the wide and irregular fluctuations in prices heretofore referred to.

The language of Mr. Justice Clark speaking for this Court in *Geddes* v. *Anaconda Copper Min. Co.*, 254 U. S. 590, 65 L. ed., , has an important bearing here:

> "There is evidence that the total production of copper in the United States and Alaska in 1899, was 581 million pounds, and of the Anaconda Company one million pounds, (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there are several mines other than those of defendants, produced 238 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.
>
> "Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent,

---

Again, at page 162: "Under such circumstances [where capacity is in excess of demand] if the law of supply and demand prevailed without restraint, prices would naturally decrease, and thus factories which are operated at the greatest expense would be forced to suspend; but such is not the result when the industry is *controlled* by an open price association."

[2] Three ciphers should obviously be added to each of the figures in the extreme right hand column of this exhibit.

the defendants restrained or monopolized the production of copper in the United States, much less in the world.

"The evidence with respect to price control, although meagre, is more definite. The average price of copper in 1899, the year before the Amalgamated Copper Company was organized, was 17.6 per pound; in 1900 it was 16.1; in 1902, 11.6; in 1904, 12.8; in 1907, 20; in 1908, 13; in 1909, 12.98; 1912, 16; and in 1913, the last year for which the price is given, 15 cents.

"It is obviously impossible to say that these fluctuating prices prove monopolistic control of the price of copper by the defendants.

"No claim is made that the Anaconda Company restrained or restricted the production of copper, but so far as there is any evidence at all upon the subject it is to the effect that it maintained and perhaps increased the production in the Butte Camp.

"Upon the case here made by the evidence it is impossible to conclude that the defendants constituted in 1911 such a combination, within the terms of the Anti-trust Act, as would justify the granting of an injunction to the plaintiffs even under the provisions of Section 16 of the Clayton Act, which we have quoted."

V.

Eastern States Retail Lumber Dealers' Association Case and Addyston Pipe Case Distinguished.

The Government relies upon the *Eastern States Retail Lumber Dealers' Association Case,* 234 U. S. 600. There, however, the *direct and immediate* object in compiling and distributing the information was unlawful—a boycott. The defendants were banded together in an association the avowed object of which

was to prevent wholesale dealers from selling directly to consumers. Wholesale dealers who *did* sell directly to consumers were reported to the secretary of the association. The secretary would then take the matter up with them. Those who persisted in selling to consumers were put upon a blacklist. These lists were circulated amongst the members of the association.

This Court found that "there could be but one purpose" in circulating the lists (234 U. S. 608); and counsel admitted that "the very object of the defendants in circulating them" was "to cause retailers receiving these reports to withhold patronage from listed concerns." (234 U. S. 609.)

There was thus presented the plain case of a combination "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." (*Loewe* v. *Lawlor*, 208 U. S. 274, 294.)

In the present case, on the other hand, the direct and immediate object was legitimate and lawful—to obtain information of market conditions. The effect upon prices was incidental. And no coercive pressure of any kind or description was applied.

The two cases are, therefore, the exact opposites of each other in principle.

The Government also relies upon the following language in the *Addyston Pipe Case*, 175 U. S. 211:

> "The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article." (P. 245.)

There again, however, the agreement had for its *direct and immediate* object and effect the destruction of competition between the parties by requiring them to abstain from bidding against each other. The opinion states:

> "We have no doubt that where the *direct and immediate effect* of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, * * * ." (P. 244.)

What was said in that case about enhancement of prices being a restraint of trade was thus said in relation to an enhancement of prices brought about by an agreement of traders not to bid against each other, the *direct and immediate* object and effect of which, of course, was to destroy competition. In the present case, however, the direct and immediate object of the association was to furnish the members with accurate information of market conditions—a proper and legitimate object.

We have pointed out in our main brief the difference between an agreement or association which has for its direct and immediate object the raising of prices or the destruction of competition, and one whose direct and immediate object is legitimate, but which indirectly may result in higher prices. (Pp. 67-73.) We have further shown that the enhancement of prices complained of in the present case was not even the indirect result of any agreement or combination of the defendants but was brought about by natural causes. (Pp. 24-30.)

VI.

Monthly Meetings.

Seventy pages of the Government's new brief are devoted to the monthly meetings. (Pp. 59-129.) In view of the special importance now attached to the *personal contact* formed at these monthly meetings as a means of suppressing competition in the hardwood lumber industry (p. 125), it is pertinent to re-state the salient facts bearing on that subject.

1. The meetings were open to everybody; there were no secret discussions.

2. All the members of the association combined produced less than one-third of the hardwood output of the United States, and on the average fewer than one-third of the members attended the meetings. Of the three hundred and twenty-nine members, one hundred and twenty never attended a single meeting, and fifty-two attended but one. (Appellants' Main Br., Part II, p. 102.)

3. Even the one-third who attended did not all meet together. As we have seen, the membership was divided into geographical groups and only those in a particular group attended the same meeting. This still further reduced the opportunity for that personal contact which the Government fears.

4. While minutes of the meetings were kept, they were not distributed amongst the membership.

5. With perhaps three exceptions all the statements which the Government criticizes are mere expressions of opinion that in view of the conditions of supply and demand in the hardwood industry the trend of prices would be upward. As we have already observed this was the truth and the defendants could not have said less if men engaged in the same industry are to be

conceded any right at all to discuss with each other market conditions.

6. The exceptions referred to are as follows: *First* some remarks of Mr. Robinson at the meeting held at Cincinnati, January 21, 1919; *second*, suggestions at several of the meetings, for instance, that held at New Orleans, January 8, 1920, that a "standard code of discounts" be established; *third*, a resolution passed at the meeting held at Jackson, August 15, 1918.

Mr. Robinson's remarks were referred to in our main brief (p. 34) and in our first reply brief (pp. 5-6.)

The proposal to establish a standard code of discounts was never adopted, as the Government admits. (Supplemental Br., p. 128.)

Of the resolution passed at the meeting at Jackson, August 15, 1919, the Government's brief states:

> "It was manifestly intended by the second paragraph to warn those underselling the market to charge from $10 to $60 per thousand more for their lumber." (P. 127.)

In another place this is referred to as an adroit way of calling the attention of some members to the fact that they were not keeping up with the procession. (P. 167.)

We reproduce in the margin below the entire resolution.[1] There never was a better illustration of the danger of accepting a prosecutor's deductions.

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[1] Whereas we think that now is the opportune time to take action to see that orders are so made that they will constitute a contract between the buyer and seller; and,

Whereas, the reports of the members of the American Hardwood Manufacturers' Association indicate that they are filling orders at from ten to sixty dollars under the market;

Be it Resolved, That an associated effort be made at this time, so that the members will be protected against cancellations should the market decline. (R., Vol. I, p. 164.)

It is plain on the face of the resolution that all that was meant was that since sellers of hardwood lumber were fulfilling their old contracts notwithstanding that they could get from $10 to $60 more in the open market, they should take measures to guard against the cancellation of contracts by the buyers in the event that the market price should fall below the contract price.

7. There were no statements by any of those present of prices to be charged in the future, much less were there any such statements followed by action in accordance therewith, as in the case of the "Gary Dinners", held unlawful in the *Steel Case*, 223 Fed. 55.

8. The Government again gives prominence to the weekly meetings held by a group of members in Memphis at which were read lists of the *high prices* reported in the Sales Reports. The present brief of the Government lays this proposed innovation at the door of the whole membership. (Pp. 146, 149.) As a matter of fact only the members located at one point, Memphis, had anything to do with it, and they abandoned it within two weeks.

As observed in our first reply brief, the facts concerning this matter were brought out by counsel for the defendants themselves, and so far from tending to establish that the plan was a cover for illegal agreements, they rather show that the membership as a whole was alert to see that its machinery was not put to any questionable use.[1]

[1] In connection with the proposal to hold monthly meetings, we wish to call attention to the following passage in the minutes of the monthly meeting held at Memphis, June 13, 1919: "Mr. Jurden, 'The stabilized market is a good thing—today nobody knows what the price is. We cannot agree on prices while the market is in the shape it is today. I move that we hold these meetings weekly. I believe that it will go a long way toward keeping the market stable.'"

If such discussions as these, carried on openly by a comparatively small proportion of the members of an industry are unlawful, or constitute evidence of illegality, the question arises, Can members of the same industry have any discussion with each other at all regarding market conditions? The logic of the Government's reasoning is that they can not, since, so it says, such personal discussions and contact break down "the spirit of antagonism which one naturally has for a competitor" and lead to "a friendly spirit of cooperation, resulting in concert of action as to every important matter common to their business activities." (Supplemental Br., p. 125.)

While the Government is driven to this extreme view of the law in order to support the decree of the District Court in this case, the mere statement of it, we think, carries its own refutation.

VII.

Market Condition Reports, Market Letters, "Booster Letters."

Fifty-five additional pages of the new brief are devoted to the Market Condition Reports, the Market Letters, and the so-called "Booster Letters."

The discussion in the Market Condition Reports, considered in our main brief at pp. 30-33, is of the same character as the discussions at the monthly

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With respect to this Mr. Jurden testified "that he did make a motion to the effect that the group meetings be held weekly instead of monthly, and this in order to keep the members of the Memphis group better informed as to the rapidly changing conditions in the market;" that he did not say, "We cannot agree on prices while the market is in the shape it is today," but that he did say, in substance, "We cannot agree on prices. While the market is in the shape it is today, I move that we hold these meetings weekly." In other words, there was a mistake in punctuating his remarks." (3 Rec. 623.)

meetings. Indeed the Market Condition Reports were the basis of the discussions at the monthly meetings.

It should be borne in mind that these reports did not reflect any consensus of opinion resulting from previous discussion at the monthly meetings or elsewhere, but were merely compilations of the replies to a questionnaire [1] made by the members individually in advance of the meetings. And less than half of the members made replies at that.

It should also be noted that the Government takes as illustrative the Market Condition Report of February 1, 1920. (Supplemental Br., pp. 26-36.) At that time *all* prices were high and still rising, and, consequently, if it was permissible for these defendants to express their opinion at all it was bound to be strongly bullish. If the court will look at the Market Condition Reports for the early months of 1919, when business was just emerging from the uncertainty following the Armistice, it will see that the opinions expressed at that time were much more conservative. In other words, the opinions honestly reflected the state of the market at the particular time.

The Market Letters sent out by the secretary,[2] in some of which he "argued" (to use the word of the bill of complaint and of the Government's first brief) that the conditions of supply and demand justified higher prices, and the so-called "Booster Letters", in which some of the members expressed the opinion that

[1] See Main Brief, Pt. I, p. 31.

[2] The extract from the Market Letter of May 17, 1919, printed on pages 47-49 of the Government's supplemental brief, was a quotation from a trade paper, "The Southern Lumberman," and the inference which the Government would draw therefrom is answered in our main brief (p. 46).

the information of market conditions obtained from the "Stock Reports", "Sales Reports" and "Production Reports" enabled them to get more money for their lumber, are fully discussed in our main brief and we have nothing to add to what is there said. (Pp. 35-48; 65-71.)

We do wish, however, to emphasize this point: That in its treatment of the Market Letters, as in its treatment of the Minutes of the monthly meetings and the Market Condition Reports, the Government has carved out and assembled those parts of the discussion in which some mention is made of conditions affecting prices or production. This tends to give the impression that the discussions were confined to those two subjects, whereas in fact they covered many other topics the propriety of which not even the Government questions.[2]

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[2] For example, take the following Market Letter, sent out when the supposed conspiracy was at its height:

AMERICAN HARDWOOD MANUFACTURERS' ASSOCIATION.

OPEN COMPETITION PLAN.

SALES REPORT.

Executive Office, Bank of Commerce & Trust Co. Bldg., Memphis, Tenn.

Vol. I. No. 46. Week Ending December 6, 1919.

MARKET LETTER.

There has been no let-up in the demand for hardwoods during the past month. With the volume of trade at its highest peak of the year, the present problem seems to be that of securing sufficient stocks to meet the demand. It is a scramble for what stocks are available on the part of customers in evident disregard of prices. All thought of lumber in plenty for coming months' requirements have passed.

The excessive rainfall in various sections of the country, particularly the Southern States, has practically put a stop to all logging. Rainfall at Memphis and in Arkansas, Louisiana and Texas, also in Mississippi, during the months of October and November was the greatest within the history of the Weather Bureau. The woods are full of water, roads are impassable, and while the mills are now manufacturing what logs they have on hand, it is predicted that a general curtail-

VIII.

The Form of the Decree.

The important and essential part of the defendants' plan for informing themselves of the conditions of supply and demand in the hardwood industry consisted, of course, in the exchange of information as to stocks on hand, past sales and prices and rate of production contained in the "Stock Reports", "Sales Reports" and "Production Reports."

In the District Court the Government refused to take any position on the question whether the compilation and distribution of this information was in and of itself unlawful, and its first brief in this Court evaded the question. On the first oral argument before this Court counsel for the Government conceded that the

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ment of operations will be imperative by the first of the year and that there is little prospect of being able to replenish the supply of logs to any extent until spring. Conditions caused by the rains will not be felt to the fullest extent until after January 1.

Hardwood stocks are pretty well cleaned up. The supply at mills of unsold stocks probably not exceeding 25 per cent of normal with production averaging about 65 per cent of normal.

The demand continues to come from the furniture, talking machine, general cabinet trade and automobile plants. Talking machine companies are so far behind on orders that they are unable to supply the Christmas demand. In furniture there is an interesting situation. The enormous mobility of the American people and the increase of migratory, club and hotel existence have made necessary a great increase in transit housing capacity at all trade and industrial centers. How these new hotels are to be outfitted is the problem. Furniture factories are already booked well into 1920 and are unable to furnish the needed equipment. The automobile industry continues prosperous, the demand apparently being insatiable.

The building shortage throughout the country is just as acute now as it was at the end of the war, especially in the larger industrial centers. The high speed at which building has been maintained promises to continue indefinitely. At the very best, if we were driving our construction activities to the limit, it would still take us four or five years to catch up with the accumulated needs of the country. Builders may expect construction costs to go higher and those who are holding off with the expectation of making more advantageous contracts in the spring are not basing their actions on good business logic. It is the part of wisdom to go ahead with building work under present conditions.

exchange of such information is *not* in and of itself unlawful. In its new brief, the Government takes no definite position on that question one way or the other, although its reasoning would indicate that its view now is that such exchange of information *is* in and of itself unlawful.[1] At this time, therefore, we do not know what its final position is to be.

In our main brief we have endeavored to show that in no possible view can the exchange of information of market conditions by means of these reports be in and of itself unlawful. (Pp. 51-73.) If that is so, the exchange of such information being the main element of the defendants' plan, the question recurs, what form of decree should be entered if any of the other and minor features of the plan should be deemed objectionable?

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[1] For example see pp. 159 and 164.

Rates of international exchange have continued to decline almost without interruption and new low records have been established. The situation is increasingly serious and stabilization of rates more and more imperative. It is not so much that the exporters of the country are hurt now, as it is that our customers abroad suffer to a degree that may have an influence against us as they grow more independent of us with the development of their own resources.

There are some indications, albeit few and scattered, that the peak of the high cost of living has beeen reached and that the coming months may witness a substantial decline in prices of necessities. The demand for lower prices is widespread, but the reduction is delayed by the fact that production still lags behind demand. Labor not only refuses to take the initiative, but demands steadily advancing wages, the effect of which is to increase costs and so check any downward move.

The steel strike is lost. It was doomed to failure before it was called, for, as we have previously stated, "Any strike which does not have the moral support of the public is a losing proposition."

The bituminous coal strike will suffer the same fate. The defeat will come through the same cause—because of their radical demands, they have not the moral support of the general public. This because a man who is suffering on account of the unreasonable demands of a small group of men will have little sympathy with the men who are the cause of his discomfort. The act of the United Mine Workers of America in calling the strike at the very eve of winter brands the leaders responsible as opportunists of the worst character.

Judge Gary was on the solidest of solid ground when he discussed

We have heretofore sought to show that while, of course, if employed in association with other elements which made it part of an unlawful plan the exchange of such information could be enjoined as part of such plan, in no event, however, ought it to be enjoined absolutely, being in and of itself a lawful and useful business practice. (Appellants' Main Br., pp. 73-77.)

To the authorities there cited we wish to add the *Bucks Stove & Range Company's Case*, 33 App. D. C., 83. In that case the circulation of certain statements as a means of carrying out an unlawful boycott had been enjoined by the lower court. The injunction ran against the circulation of such statements not merely as a means of carrying out the boycott but absolutely and perpetually. As the circulation of the statements, at least some of them, was not itself an unlawful act, the Court of Appeals held that the injunction should

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the relative responsibility of organized capital and organized labor before the law. Organized capital has been shackled by statute, and rightfully. Its vast powers have been brought under restraint. It has been compelled to be responsible, but no such responsibility exists in respect to organized labor. It is not obliged to incorporate and does not incorporate. Its contracts are worthless except insofar as it is willing to carry them out. When it is unwilling there is no power that can make it carry them out. Day after day come strikes which involve a direct repudiation of contracts entered into between employer and employee, and the employer is helpless. That is the basis of most of the antagonism to organized labor. As long as it maintains that attitude the corporation that insists on the open shop regardless of every other consideration is sure to find plenty of sympathizers.

Continued rains have damaged crops in some sections. Considerable corn has been destroyed, although a heavy crop is being harvested, and the average quality is high. Unpicked cotton has been damaged and much cotton seed has spoiled through sprouting. The rains have also interfered with the planting of winter wheat.

Reversing the declining tendency of most preceding months this year, commercial failures in the United States during November as reported to R. G. Dun & Co. showed an increase over October and are more numerous than those of any month back to last March. Babson says, "The number of failures has reached nearly an irreducible minimum. Almost any kind of business can get by under present conditions. The small number of failures, which most people point to as a favorable condition, is really a sign for caution. It is not too many failures, but too few which has really caused our great business crisis."

be limited so as to prohibit the statements from being circulated *in furtherance of the boycott.* The opinion of Mr. Justice Robb states:

> "The italicized words ['in furtherance of the boycott'] should be added, for, when the conspiracy is at an end, the federation will have the same right that any association or individual now has to comment upon the relations of complainant with its employees. It is the existence of the conspiracy that warrants the court in prohibiting the printing of this list. Manifestly, when the conspiracy ends, the prohibition ought also to end." (Pp. 109-110.)

Director General Hines has disposed of various rumors of an impending general advance in freight rates by passing the buck to the railroad companies for action after the railroads have been returned to the private owners. He suggests, however, that if corporations desire to make progress at this time with preparations for an advance he will assist them by placing the traffic organization of the Railroad Administration at their disposal for a study of the problems to determine what tariffs they think ought to be proposed. Freight rates seem due to raise, so snip now if you can or protect yourself against the advance.

The question of the procedure to be adopted in making purchases of ties and other railroad materials and supplies which will be needed by the railroads next year is still under consideration by the Railroad Administration. This will also probably be passed along to the corporations, and few purchases will be made before that time. The railroads should be heavy buyers of lumber during 1920 and for several years thereafter. President Howard Elliott, of the Northern Pacific Railway, recently stated "that the railroads will need $3,000,000,000 for new equipment during the next few years and should spend an equal amount on new tracks and terminals for proper handling of country's expanding business."

The danger of a general car shortage which seemed imminent thirty days ago has seemingly been obviated, and while cars are still scarce, this situation has not materially influenced the market. In some sections manufacturers complain of their inability to secure their car requirements, but taken as a whole, the present transportation outlook compares favorably with that of this season in former years.

In preparing the program for the annual meeting which will be held at the Hotel Chisca, Memphis, Tenn., on Tuesday and Wednesday, December 16th and 17th, 1919, a portion of the time has been set aside for a general discussion of the Open Competition Plan. This should prove a most interesting meeting and every member should come prepared to participate in the discussion.

AMERICAN HARDWOOD MANUFACTURERS' ASSOCIATION.

F. R. GADD, *Manager of Statistics.*

The concurring opinion of Mr. Justice Van Orsdel states:

> "The publications complained of, not being in themselves subject to equitable restraint, the decree should only restrain these publications as an incident to and in furtherance of the conspiracy. With these modifications, as embraced in the modified decree set forth in the opinion, I concur." (P. 126.)

Even on the Government's theory that it is within the *discretion* of the court to prohibit these reports absolutely because they were part of an unlawful plan, to do so would be contrary to the principle laid down by this Court in the *St. Louis Terminal Case*, 224 U. S. 383, and followed in the *Great Lakes Towing Company Case*, 217 Fed. 656, and in the *New England Fish Exchange Case*, 258 Fed. 732, namely, that where an association of traders or carriers in some of its important aspects is lawful and useful to trade but has had attached to it some illegal elements which can however be separated from that which is lawful and useful the whole association should not be condemned to extinction but only the illegal features.

IX.

Elements Not in the Present Case.

We notice a disposition on the part of the Government to bring other co-operative plans into the present discussion. It is in order to point out, therefore, some features alleged to exist in other cases brought by the Government which are *not* to be found in the present case:

1. There is no agreement to fix prices.

2. There is no agreement to regulate production.

3. There is not even that uniformity in prices or in ratio of production to capacity which, with other circumstances, might give rise to an implied agreement to fix prices or regulate production.

4. No pressure or criticism of any kind or description is ever brought to bear upon those members of the plan who sell at lower prices or produce at a higher ratio of capacity than their associates.

5. There is no dictation as to the class of customers, whether wholesalers, retailers, or consumers, to whom sales may be made.

6. There is no exchanging of price lists, quotations or bids at all, much less consultations in advance thereof.

7. There are no declarations of future purpose as to prices or production whatever, much less any such declarations followed by action in accordance therewith.

8. There is no division of territory.

9. There is no apportionment of customers.

10. There is no pooling of earnings.

Respectfully submitted,

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Attorneys for Appellants.

Gregory & Todd,
Of Counsel.

October, 1921.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 369

AMERICAN COLUMN & LUMBER CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION.

STATEMENT OF CASE.

The question involved in this case is whether an association or society, which collects from its members, and then distributes to them, information which is true, as to past sales or completed contracts, stocks of goods or commodities on hand, is a combination in unlawful restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act.

In this case the United States by its attorney for the Western District of Tennessee, acting under the direction of the Attorney General, filed its bill of complaint against 329 corporations, firms and individuals engaged in manufacturing hardwood lumber, together with 275 individuals who, it is alleged, were representing them, for the purpose of enjoining these defendants from car-

rying out an alleged conspiracy in restraint of interstate trade and commerce in hardwood lumber, all as forbidden by the Sherman Anti-Trust Act.

In support of this charge the Government claims to have shown:

First. That the defendants, or some of them, organized an association called the "Open Competition Plan" as a part of the American Hardwood Manufacturers' Association.

Second. That this Association collected from its members information as to past sales or completed contracts for the sale of hardwood lumber, also information as to stocks of hardwood lumber of various kinds which were on hand.

Third. That from this information so collected the association made up and sent out to the members—

(a) Monthly "Stock Reports" showing the normal stocks, the entire actual stock and the unsold actual stock of each defendant, and of all in the aggregate;

(b) Monthly "Production Reports" showing the normal monthly production, the actual monthly production, and the estimated future production of each defendant, and of all in the aggregate; and,

(c) Weekly "Sales Reports" showing separately each actual sale of hardwood lumber made by each defendant, giving the name of the seller, the kind and amount of lumber sold, the destination, and the price for which it was sold.

Fourth. That some 54 members out of 329 wrote to the Secretary letters commending the Association, a number of them stating that the information secured through the Association had enabled them to secure better prices for their lumber than they other-

wise would have secured, excerpts from some of these letters being sent out in a bulletin to the members of the Association.

Fifth. That several members at some meetings stated that prices of certain of their products should be higher.

Sixth. That the Secretary of the Association, in certain letters or bulletins which he sent out, stated that there was a shortage of certain kinds of hardwood lumber and that prices should be higher; that he also sent out an article reprinted from the Southern Lumberman, a lumber trade paper, which was alleged to be an argument against increasing production by night work.

Seventh. That from January 1, 1919, to early in the year 1920, prices of hardwood lumber greatly increased.

These facts the Government claims show an illegal combination or conspiracy in restraint of trade or commerce among the several states, within the meaning of the Sherman Anti-Trust Act.

The theory of the Government is that high prices restrain trade or commerce; that the purpose of this Association was to secure higher prices for hardwood lumber; that higher prices followed the organization and operation of this Association, and that therefore they were caused by it; that since the Association caused higher prices, that must necessarily have been the purpose of the members, and that, therefore, it must be an Association in restraint of trade.

But the following facts are also to be noted:

First. The "Open Competition Plan," so called, was put into operation as early as March, 1917, but the Gov-

ernment alleges that the conspiracy began in January, 1919; it is not alleged that the claimed conspiracy began as of the date of the putting the "Plan" into operation.

Second. The information collected and distributed to the members was of the same kind and character as that which every prudent man secures or endeavors to secure before entering into any business transaction, whether it involves much or little in amount, and information which is absolutely essential if the business is to be carried on in a competitive manner.

Third. The information collected and distributed by the Association was TRUE. There is no allegation or claim that any statements of fact or statistics were false, or that any facts were withheld or suppressed.

Fourth. There is no allegation or proof that the statements made by several members out of 329 to the effect that prices of hardwood lumber should be higher were not honest, spontaneous expressions of opinion regarding general conditions by the individuals making them.

Fifth. There is no allegation or proof that the statements made by the Secretary in the bulletins, to the effect that prices should be higher, were not honest expressions of his opinion as to general market conditions.

Sixth. There is no allegation or proof that the article which was reprinted from the Southern Lumberman was not an honest independent expression of the views of that trade journal made in a regular publication based on what it believed to be a sound trade policy in the lumber business, and was not induced by any ulterior motive.

Seventh. The evidence shows that during the period in question production on the part of the members of

the Association was increased and not diminished; that in individual cases where production was below normal, it was on account of, among other causes, labor shortage, disorganization due to the war, and an almost unprecedented rainfall. As far as this record discloses, every member produced as near his capacity as possible.

Eighth. There is no showing to the effect that any member was under any obligation or constraint, legal, moral or social, to ask higher prices or limit production. This was admitted by the Government upon the first oral argument before this Court.

Ninth. There is no claim and no evidence that the members of the Association, by agreement or otherwise, refrained from seeking business which was being sought by other members of the Association.

Tenth. There is no claim and no evidence that the members of the Association by agreement or otherwise, limited themselves to any section of the country, or in any way divided up the business, or entered into any "pooling" operations.

Eleventh. There is no evidence that any member of the Association had any understanding to ask higher prices, or maintain prices or limit production.

Twelfth. There is no showing and no evidence that the prices asked by the individual members of the Association were not the prices made by each individually upon his own final, independent judgment as to the factors which affect supply and demand.

Thirteenth. There is no evidence that the prices asked by any of the members during the period in question were too high, taking into account the actual cost of producing hardwood lumber or that such prices were not in accordance with the economic conditions of supply and demand.

Fourteenth. There is no evidence that the prices asked by the members of this Association during the period in question were any higher, if they were as high, as the prices of other producers of hardwood lumber who were not members of the Association.

Fifteenth. The evidence shows that while the prices of hardwood lumber rose during the year 1919, yet they did not rise any faster nor go as high during the same period, as the prices of most other articles of commerce.

Sixteenth. There is no proof that a rise of prices restrains trade or commerce when those prices are in harmony with economic conditions and are not caused by monopoly, suppression of competition or some other artificial factor.

WHEN THESE FACTS ARE CONSIDERED, IT BECOMES CLEAR THAT THE EVIDENCE FAILS TO SHOW THAT THE ASSOCIATION WAS A CRIMINAL CONSPIRACY IN RESTRAINT OF TRADE OR COMMERCE, BUT THAT SUCH A CLAIM IS A PURELY GRATUITOUS ASSUMPTION, FOUNDED ON SUSPICION AND A MISUNDERSTANDING, IF NOT A DISREGARD, OF ECONOMIC LAW.

I.

MARKET NEWS IS THE VERY BASIS OF COMMERCE.

Commerce is the most practical activity men engage in. Its operations are not founded upon the theories of philosophers, the maxims of economists, or even the self-commended wisdom of politicians. Commercial operations, if they are to succeed, are founded upon facts.

Ships do not create commerce. If they did the Government would have an enormous carrying trade instead of a lot of expensive ships which are not doing any carrying and which can be sold but for a pittance of

their original cost. Rails and engines and freight cars are not trade. They are merely its instrumentalities. Back of the ship laden with goods sailing on its course is some mind, some intelligence which, before the ship started on her voyage, calculated the price at which the cargo could be bought, the price at which it could be sold at its destination, the cost as well as the hazard of the voyage, and, finally, whether a profit could be made.

Men do not start out blindly with cargoes of wheat for Argentina, with carloads of oranges for Los Angeles, or with colliers loaded with coal for Newcastle.

Before every business venture there is careful study of the trade situation with regard to the commodity proposed to be traded in; the fullest possible information is secured as to the proposed market; as full a study as possible is made as to present prices; supply of and demand for the commodity is carefully studied. It is upon facts of this character that business intelligence operates.

A housewife before buying sugar for her household will scan the newspaper for advertisements as to prices, will inquire of the different grocers in her neighborhood. The man with 100 shares of bank stock to sell will call up various brokers to get quotations and study the statements of the bank as to its condition.

The farmer before he sells his live stock will find out prices offered by the local buyer, will carefully follow the live stock prices at the Chicago Stock Yards, as shown by the daily papers, will get advices or bulletins from various live stock commission firms giving their views as to supply and demand and probable course of the market.

The large exporter of wheat may have to study the trade conditions of the entire civilized world and secure

the advice of experts in half a dozen countries as well as the latest Government reports before a cargo of wheat sails for Liverpool, yes, even before the cargo of wheat is purchased or the vessel chartered.

Such knowledge has been sought after ever since men began the crudest form of barter. It has developed and become more exact as business has developed. Commerce, based on market news, is business with the speculative element reduced as much as possible. A commercial transaction not based on intelligence as to facts and conditions is not business; it is merely gambling with a less convenient instrumentality than is afforded by dice, cards or a roulette wheel.

In other words, even if there are carriers to transport commodities, even if there are adequate local, central and retail markets, even if elevators and warehouses are provided for proper storage, nevertheless, the whole mechanism of distribution could not function except in the most haphazard manner unless authentic current trade information were available, and the reason is that prices would seldom be such as the actual or probable supply and demand would warrant.

Production or supply of a commodity in its relation to the demand for that commodity establishes the price of the commodity, at any given moment. But, unless the amount or quantity of an article in existence be known actually or approximately, unless the demand for the commodity in some way can be estimated, the forces of supply and demand cannot operate, price will be a matter of guesswork, based not on facts, but on ignorance. Market news furnishes to men that knowledge of supply and demand which enables them to trade. Business is a going concern. The buyer and seller do not build a price from the ground up every time a trade is made;

as a matter of fact, to-day's price is yesterday's price modified only by men's judgment of to-day's market news. To-morrow's price will be to-day's price unless modified by individual interpretations of market news. The very heart of modern business transactions is market news operating through price changes.

Price setting is a process of adjustment which we call bargaining. But the basis of bargaining is market news. Bargaining on the basis of market news is the process by which prices are continually balanced to market conditions, local, national or international; that is, to supply and demand.

Price determination is the "interpretation" into terms of money of the market condition. It is the best expert opinion of market news. The price of any commodity at any given moment is an understanding which buyer and seller reach of supply in relation to demand on the basis of trade information.

Any trade information which may have any effect upon the price—that is, any news having to do with either the production of, or the demand for the commodity, is market news.

This information centers around the following problems:

1. What is the visible supply of the commodity?
2. What is the volume of production?
3. What is probably future supply of the commodity?
4. What is the present demand for the commodity?
5. What is the probable future demand for the commodity?
6. What is the present price of the commodity?
7. What is the present volume of sales?

Market news enables men to carry on commerce with intelligence, to move supply so as to meet demand, to

adjust production to demand, to anticipate the future, to adjust prices to the actual conditions of supply and demand.

Market news is not supply and demand; it is merely knowledge of these economic forces collected for the purpose of business management.

II.

THE COLLECTION AND DISSEMINATION OF MARKET NEWS, THAT IS, OF INFORMATION IN REGARD TO MARKET CONDITIONS, THE SUPPLY OF COMMODITIES AS WELL AS THE DEMAND FOR THEM, IS COMMON IN EVERY BUSINESS.

Formerly, market news was collected in a very haphazard fashion. As civilization develops, men tend more and more to eliminate chance as much as possible from their operations, so that to-day, instead of market news being collected as in the past, men have developed agencies—some are in connection with the press, some are associations of individuals acting co-operatively, some on account of the size of the industry or on account of its importance, are organized and operated by the Government itself.

Market news is to-day collected by—

(a) Private agencies, including associations;

(b) Governmental agencies;

(c) Personal efforts of individuals for their own trading.

(A) PRIVATE AGENCIES, INCLUDING ASSOCIATIONS.

Trading associations, guilds of craftsmen and guilds of merchants, were well known in England centuries ago. Such organizations were certainly regarded at the com-

mon law as a normal and usual method of furthering trade.

In the United States to-day there are thousands of trade associations collecting trade information and distributing it to their members.

Lloyds. Sometime, as early as the year 1688, merchants and sea captains began gathering at Lloyd's Coffee House in Tower street, London. An association of marine insurers was formed which regulated the form of marine insurance policies, and the relationship of the members to each other and began the collection and publication of shipping news, which still continues under the name of Lloyd's List. To-day Lloyds is probably the greatest commercial institution in the world. Over 1,500 agents in every part of the world keep it informed to the minute, day and night, of the movements of all ocean-going ships and of all casualties. Such information, of course, has an influence on the rates of marine insurance, for if a vessel is not sighted for many days, if the fact is known, the rates on such vessel will go up.

The Newspaper. The business page of any daily newspaper is largely devoted to "Markets." It is largely filled with information as to the transactions in stocks, in bonds, in money, in live stock, in grain, in cotton, in produce, in real estate, in manufactured goods. The volume of trading, the amount sold, the prices in more or less detail, estimates as to production, news as to weather, strikes, wars, rumors of wars, politics, anything which it is thought might affect production, statistics as to supply on hand, estimates as to consumption, any news which it is thought might affect demand, are all set forth.

In the Grain Trade there is Broomhall's News Agency. It has official representatives in all of the great grain exchanges of the world. It has over 300 expert agents scattered throughout the grain-producing countries. "Advices" are received from agents daily and weekly by mail, wire and cable. It has its clearing house in Liverpool, but news can be sent by it from Liverpool and posted in New York in six minutes.

The Grain Brokers of the great exchanges have highly organized agencies reaching out to the grain-producing countries in order that they may have advance information on crop conditions, especially during the critical period of the season. The appearance of rust, of Hessian fly, of early or late frosts, are quickly noted.

Stock Brokers have great news gathering agencies, such as the New York News Bureau and Dow-Jones & Co. Their offices are connected oftentimes by private wires, not only with the markets, but with special centers and all facts affecting prices, or opinions affecting prices, as well as the quotations of prices are flashed to them from all parts of the earth.

The Oil Interests have in their employ a large number of experts clearing the information collected through the Petroleum Institute.

The Iron and Steel Interests have developed in the United States the Iron and Steel Institute.

The Banks—Almost all of the *large banks* have developed departments devoted to the collecting of various sorts of trade information and disseminating it to their customers.

Special Magazines, such as the New Orleans Cotton Exchange Reporter, Dun's Review, Bradstreet's Review, Broomhall's Corn Trade News, the Iron Age, The Railway Age, The Paint, Oil & Drug Reporter, are but a

few of the innumerable commercial, financial and industrial market newspapers and magazines collecting and disseminating market news to those who are interested enough to pay them for this service.

Financial Papers—Daily papers, such as the Wall Street Journal, the New York Commercial, Chicago Journal of Commerce, weekly papers, such as the Commercial and Financial Chronicle of New York, the Economist, Barron's Weekly and many others, are largely devoted to market news, including sales prices, as well as prices offered, of stocks, bonds and various commodities, which may be of value to various lines of business.

All of this is aided by the post office, by the system of telegraph and telephone lines and by the great ocean cables which bind the markets of the world together.

(B) GOVERNMENTAL ORGANIZATIONS.

The Government has not left its citizens dependent upon their own resources for market information, but in certain lines it collects and distributes this information for them, and has established a number of bureaus for that purpose. The United States Patent Office, beginning in 1839, collected certain crop statistics and continued this until 1863.

The Bureau of Crop Estimates.

It was on February 1, 1863, that the first appropriation was made for the Department of Agriculture. It amounted to $90,000. In 1865 the sum of $20,000 was appropriated for a statistical bureau which was then called the Bureau of Statistics in the Department of Agriculture. Later, the name was changed to the

Bureau of Crop Estimates; for the year 1921 the appropriation for this bureau amounted to $188,076.

It is the chief function of the Bureau of Crop Estimates to collect statistics on the four great staple crops —corn, cotton, wheat and oats.

1. Reports are received from about 32,000 township correspondents, who are farmers residing in the farming townships throughout the country.

2. Similar reports are received from some 2,800 county correspondents.

3. Special reports are received by the bureau from about 30,000 millers, elevator men and grain dealers, over 23,000 cotton ginners, 15,000 bankers, merchants, factors, exporters, buyers, etc. In making estimates of the yield of cotton, blanks requesting a statement of the amount of their own particular output, are sent to over 84,000 cotton growers.

4. The bureau receives reports from a number of special field agents, crop experts who are salaried employees of the Government, who travel throughout the farming district where they are stationed.

5. The bureau receives reports from state statistical agents, each of whom reports for a state as a whole. These secure information from some 15,000 voluntary local correspondents.

This material all goes to the Crop Reporting Board, consisting of five experts, including the chief of the bureau. From this material the final estimates by states are determined.

These estimates are turned over to the newspapers and to telegraph operators at 2:30 o'clock in the afternoon of the 8th of each month. Until it is given out, this information is guarded with the greatest care.

About 2,000 copies of the summarized estimates are sent to the newspapers and others interested and later in more detail in the Monthly Crop Report. These crop reports cover—

1. The acreage planted, stated in terms of acres;

2. The condition of crops in percentages, based on a normal crop of 100 per cent;

3. The yield per acre;

4. The estimated total production;

5. The average prices per bushel, pound or other unit;

6. The total farm value of given crops;

7. The stocks on hand at given times;

8. The amounts shipped out of the county of production, which indicates the estimated volume of grain, cotton or other crops reaching the country's markets.

In addition to the reports dealing with wheat, corn, oats and cotton, the Crop Reporting Service also covers barley, rye, buckwheat, flaxseed, rice, tobacco, potatoes, sweet potatoes, sugar, cattle, hogs, sheep, horses, hay, wool and, to a more limited extent, fruits and vegetables.

Weather Bureau.

The Monthly Weather Review of the Weather Bureau, which is a part of the Department of Agriculture, publishes concise statements as to weather conditions throughout the crop-growing districts, the damage resulting from drought, excessive rainfall, frost and like conditions, temperatures and precipitation with departure from normal conditions.

All of this information at times exerts the greatest effect upon the prices of agricultural commodities.

The United States Census Office.

This bureau from time to time, by actual canvass, checks certain returns of the Bureau of Crop Estimates (which are but estimates), especially as to production and acreage.

This is especially done with regard to the cotton crop.

1. Beginning in June, it reports the estimated cotton acreage as of May 25th;

2. Thereafter it issues ten preliminary bi-monthly reports of the cotton ginned to specified dates;

3. It issues monthly reports of cotton consumed, imported, exported and on hand, and of the number of active cotton spindles;

4. It issues three reports of cotton seed crushed and linters produced.

5. It issues an annual bulletin entitled Cotton Production, in which it reports in detail the total output of cotton and linters in the United States as reported by ginners and delinters, the total output of the cotton-producing countries and the consumption, exports, imports and stocks of cotton in the United States for specified periods.

6. It also issues an annual bulletin entitled Supply and Distribution of Cotton, showing the total supply of cotton in the United States for the year ending August 31st and its distribution, together with statistics of spindles, with consumption, stocks on hand, imports and exports and certain statistics of spindles and cotton consumption and textile fiber production in foreign countries.

The census returns are obtained by actual canvass of the ginners, delinters, dealers and merchants, warehouses, cotton mills, etc. The returns of exports and im-

ports used in its reports on supply and distribution are compiled from reports of the Bureau of Foreign and Domestic Commerce of the Department of Commerce, which collects them from the customs records.

Every ten years the census office makes a canvass of other agricultural crops, making for each a detailed statement of acreage, production, total farm value, average yield per acre, average farm value per bushel, or other unit of quantity.

These census returns, especially those with regard to acreage and production, are used as a check upon the current crop reports by the Bureau of Crop Estimates.

United States Bureau of Foreign and Domestic Commerce.

Commencing a few months ago, the Department of Commerce of the United States has been, and now is, collecting from various Associations and individuals, production and consumption statistics relating to basic industries. These statistics are compiled, classified and published in a monthly bulletin, entitled "Current Survey of Business." Fifteen hundred copies of the first issue, published in July, were distributed, and 15,000 copies of the last issue, published in September, were distributed. The demand for the same is continually increasing. This publication covers both foreign and domestic commerce, and it seems to be the intention of the present Secretary to greatly enlarge and develop this work as to all the principal commodities in order to give better direction to business as a whole and assist in avoiding periods of business depression.

This bureau also annually compiles and publishes the United States Commerce and Navigation Report. This gives the official returns of the exports and imports

which it collects from the records of the United States Customs Office of the Treasury Department.

It, in addition thereto, publishes less detailed monthly returns of exports and imports in the monthly Summary of Commerce and Finance. It collects facts about foreign markets and gives them out to those who are interested.

The Federal Trade Commission.

The Federal Trade Commission has collected and published much statistical information with regard to certain industries.

In its report dated June 30, 1918, it states, page 17:

> "During the last half of 1917 the Commission undertook the collection and compilation of statistics for the newsprint and book paper industries, partly in order to supply certain trade information formerly furnished by a trade association which had been dissolved by judicial decree."

Also:

> "Summaries of statistics are issued monthly for the information of various branches of the government as well as for manufacturers, distributers and customers."

Comment might be made on the wisdom of a government which would destroy an instrumentality so necessary to business that when it was destroyed the Government would find itself under the necessity of undertaking the function of the instrumentality of commerce which it had destroyed. The little item of the cost to the Government of such procedure seems not to have been thought of.

In its report dated June 30, 1919, the Federal Trade Commission says, page 28:

> "Weekly, and later, monthly reports were made by paper manufacturers on the output of various

grades, including newsprint, book-wrapping and hanging paper, *together with information as to prices.* Similar reports were received periodically from pulp makers for various sizes of product. Publishers also made report of their consumption both of newsprint and book paper. The operations of jobbers and certain other aspects of the paper trade are also reported. The facts so received were compiled and monthly reviews were issued by different branches of the trade giving the more important data." (Italics ours.)

United States Geological Survey.

This bureau gathers data on the production of various minerals and it also makes reports on the deposits of minerals and ores.

Department of Forestry.

This bureau secures data on timber and timber supplies and publishes it from time to time.

International Agricultural Institute.

This is an international organization which has its headquarters in Rome. Its work is carried on by money appropriated by the leading nations of the world and the information collected as to the fundamental crops is sent broadcast every month.

The Institute thus describes its function:

"Commerce is international; markets are international; economics must be studied as world-wide in its application. The products of every clime find consumers in the utmost parts of the earth, and those who extend their knowledge to world production and world consumption are the only ones competent to handle the marketing problems of the Twentieth Century."

(C) INDIVIDUAL EFFORTS.

The smallest business finds it necessary to do something in the way of collecting information as to market conditions. The country store keeper finds out conditions from the farmers, asks questions of the traveling salesmen, has the advice of the local banker. A manufacturing business is continually collecting information from its salesmen in the field.

In fact, before a man will buy or sell a crop of wheat, a carload of steers, a shipload of lemons, 100 shares of stock, or a $1,000 bond, he will secure some information of some character before he makes the deal.

As Chief Justice Waite said, in discussing the wide use of the telegraph in the case of *Pensacola Tel. Co.* v. *West. Union Tel. Co.* 96 U. S. 1:

> "A prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information."

III.

THE COLLECTION AND DISSEMINATION OF TRADE INFORMATION DOES NOT DETERMINE PRICES.

We live under a regime of individual enterprise. Men do what, from their own individual standpoint, they think will pay best. But what that is, is the individual's own interpretation of trade information as he knows it.

Men are of all degrees of intelligence or lack of intelligence. One man will see the possibilities of a business situation, where all of his fellows see nothing. Men vary greatly in foresight. One man with no more facts at his command than a thousand of his fellows, will anticipate events many months and that greatly to his profit. Men differ greatly in their courage or lack of it. Some men, when they have made commitments, become easily fright-

ened when events seem to go against them. Others, in the same situation, are merely hardened in resolution by untoward events once they have made up their minds as to a proper course of action. Men differ greatly in the matter of their hopefulness. Some are very optimistic and confident as to the future; others are always doubtful as to the course of events and on the lookout for calamity.

Men differ greatly in their situations. Some men are so situated that they can wait a long time for a possible gain; others in the same business are forced by their necessities to take a different course of action.

The cables flash the news that an Austrian Grand Duke has been assassinated. One man, who has never heard of the Grand Duke, has no knowledge of politics or history, receives it as calmly and serenely as a child. To another it spells war with all of war's tremendous influences on the world's commerce and he immediately sells stocks and buys wheat. One man sees the price of wheat fall, he hastens to sell. His neighbor is resolute not to take a loss and holds on. The wires carry the news that wheat has advanced in price. One man, believing it will not go higher, sells. Other men, believing there is a shortage and that the rise is the beginning of a great advance, hasten to buy. One man has a strong belief in the future of his country and enlarges the capacity of his plant and increases production. Another, feeling that "hard times" are approaching, calls his salesmen off the road and begins to reduce his force. One manufacturer is heavily in debt and under constant pressure from his bank to liquidate so he cuts prices or fails to raise them on an advancing market. Another well fortified with cash resources holds his product until he gets what he feels is a proper price.

In other words, Market News does not make the price. The price results from the varied individual actions of men dealing in a commodity, some producing, some consuming, some buying, some selling, some transporting, some storing, some lending money on the security of the commodity, some refusing to lend on its security and calling loans already made.

It is not the information itself which determines prices. It is the different *interpretations* which *hundreds,* or even *thousands,* of men place upon *that information* and *their resulting individual actions.*

The following press reports illustrate the proposition as to the functions of market news.

Under date of September 1, 1921, the "Commercial" edition of the Chicago Herald & Examiner had the following item:

"COTTON RISES $6 BALE IN TEN MINUTES AFTER BULLISH U. S. REPORT.

NEW ORLEANS, Sept. 1.—The wildest kind of a bull market was created in cotton today by the government's August condition figures of 49.3 per cent of normal, the lowest condition report ever issued for any month, and indicating a yield of only 7,037,000 bales, the smallest crop in about thirty years.

In the first ten minutes following these figures the market bulged 121 to 130 points, or about $6 a bale, October touching 17.25c and all months going to the highest levels since last November. Following this violent upturn, extremely heavy realizing by longs caused a reaction of about one hundred points, but in the later trading the market steadied up again and the close was at net gains on the session of 140 to 151 points, with October at 16.95c."

Under the same date, the following appeared in the Chicago Journal of Commerce:

"SOUTH REJOICES OVER BIG JUMP IN COTTON PRICE.

Government's Report Predicts Crop of Only 7,037,000 Bales for Year.

Condition 49.3% Normal.

Eitimated Production Near One-Half of Total Supply for 1920.

Market Up $8 Bale in Day.

Means Release of Huge Volume of Bank Credit; Buying Power Increased.

By William L. Ayers.

The most constructive development in the financial world in many months was reflected in yesterday's report on the cotton crop, issued by the Department of Agriculture. On this basis of its showing, which cannot be too greatly stressed in view of prevailing conditions, the South will be enriched beyond the fondest expectations and a release of a huge volume of bank credits, together with a big increase in buying power, will follow.

A crop of only 7,037,000 bales is predicted in the government's report, based on a condition of only 49.3 per cent of normal. This just about one-half of the full crop of 1920, and the smallest production in thirty years. Its immediate effect was an advance of approximately $8 a bale in the price of cotton on the New York Cotton Exchange.

The South has been for many months in the slough of despondency because of the bankruptcy price at which that section's principal commodity has been selling. Today the South has just reason for rejoicing. In the last month the price of cotton has advanced about 5 cents a pound, which means that the South is enriched by $325,000,000.

Outlook Exceedingly Bright.

There is no reason to believe that this will be all. On the showing of the official report cotton growers

of the South are virtually assured of prices for the remainder of the old crop, which would have been almost unbelievable three months ago."

Under date of September 6, 1921, the following appeared in the Commercial edition of the Chicago Herald and Examiner:

"COTTON AND GRAIN RISES AID STOCKS.

Should Release Frozen Agricultural Credits for General Industry.

NEW YORK, Sept. 5.—Improvement in the prices for grain and cotton is the biggest influence making for betterment in the securities markets.

This, together with the heavy expansion in the exports of those commodities, is doing much to thaw out the frozen credits in the agricultural districts which resulted from the recent precipitant decline in the prices of those commodities.

The farmers are now finding themselves in possession of funds that can be used to pay off their loans to the banks. The latter in turn will be in a position to extend financial aid to general industry.

The beneficial results to the banks because of the advance in commodity prices may be gleaned from the fact that since July, when the low record prices for cotton were made, the quoted market price for that staple has expended $225,000,000 for the carry-over of 7,500,000 bales on hand in the United States.

Expect Rise to Continue.

Economists believe that the prices of grain and cotton will continue upward. This is considered especially true regarding cotton. The cotton crops all over the world are about two-thirds of what they were a year ago. Expert cottonmen state that 20-cent cotton will not even discount the shortage of the staple. Exports of cotton from the United States are double this year what they were for the same period in 1920."

Under date of September 9, 1921, the following appeared in the Commercial Edition of the Chicago Herald-Examiner:

"$400,000,000 IN PAPER PROFITS GO IN COTTON SLUMP.

NEW YORK, Sept. 8.—A flood of selling orders broke the price of cotton futures $5 to $7.50 a bale today, making a drop of about $18 a bale since yesterday's advance to the peak of the upward movement.

The drop means a loss of about $400,000,000 to the South in 'paper profits.' The $55 a bale gain up to the close of the market yesterday represented about $800,000,000.

Sentiment in cotton circles today was that the recent advance of more than 5 cents a pound had been too rapid and not warranted by outside conditions."

Under date of September 9, 1921, the following appeared in the Chicago Tribune:

"LIVERPOOL STARTS COTTON DROP.

The extremely violent reaction in the cotton market, which at one time in the day brought the price for next month's delivery down to last week's closing level, began in Liverpool. That market started the week's wild speculation while New York and New Orleans were closed on Saturday and Monday. Today the English speculators appeared to be taking quick profits. The New York market followed suit, leaving it a matter of somewhat interesting conjecture to what extent the south has sold its accumulated cotton on the rapid advance.

The extent to which the facts set forth in the government's September crop report should normally change the level of cotton prices will remain a puzzling problem, dependent on the one hand upon the willingness of southern producers to sell the raw material, and on the other upon the willingness of northern and European consumers to buy the finished goods. Thus far the market's action is illus-

trative chiefly of the world's disposition to speculate in values."

In the Commercial Edition of the Chicago Herald and Examiner under date of September 12, 1921, the following appeared:

"GULF STORM HELPED SEND COTTON UP.

NEW ORLEANS, LA., Sept. 11.—The price of cotton moved over a range of nearly 4 cents a pound, to $20 a bale this week. Fluctuations were violent on several sessions and were held in check only by the rules of the cotton exchange limiting price changes to 200 points in any one session.

On Wednesday all months bulged the full 200 points allowed, on the first sales on the opening call, something never before witnessed.

At the highest levels of the week prices were 400 points over last week's close and at the lowest they were unchanged to 150 points up.

October traded as high as $21.49 and May as high as $20.10. On the close October stood at $20.25 and May at $19.45, the near being much stronger than the distant in the last couple of sessions of the week.

On the closing sessions pronounced strength was displayed as the result of the disastrous storm in Texas and the increasing evidence that the hurricane was moving toward the Yucatan channel, from which locality it would be the usual menace to the cotton region.

The storm in Texas had marked effect on the values because they followed several days of local rains, the effect of which was held to be disastrous.

The increased exports of yarns from Great Britain were received favorably. British Board of Trade returns showed exports of yarns during August of 15,200,000 lbs. against 12,900,000 during the same month last year. Reports of a generally better spot inquiry in the markets of the interior had much to do with the rise in contracts."

It is evident that the market news does not determine the price. The price at a given time is the resultant

of the action of, it may be, thousands of men, and these men act not according to market news, but according as they individually *interpret* market news. In the last analysis, the price is fixed by supply and demand.

IV.

TRADE INFORMATION IS ABSOLUTELY ESSENTIAL IN ORDER TO COMPETE.

In the case of *U. S.* v. *Union Pacific R. R. Co.* 226 U. S. 61, Mr. Justice Day said (page 87) in describing competition:

> "To *compete* is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific through its agents, advertisements and literature had undertaken to obtain transportation for its 'Sunset,' or southerly route across the continent, while the Union Pacific had endeavored, in the same territory, to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast."

But it must be apparent that any real striving to obtain what another has must be based on knowledge of what the other has.

Unless it is known that a man has some desirable thing, no one will try; no one can try to take it away from him.

The Union Pacific and the Southern Pacific railroads, in the case mentioned above, when they were competing, were not two moles burrowing in the ground. Each of them was at all times adequately and fully informed of the efforts of the other to secure transcontinental traffic, the rates which were being offered, the special accommodations which were being furnished, and the efforts of the one were a continual spur to the efforts of the other. Had each been ignorant of the other's activity, there could have been no real striving for supremacy.

The wheat growers of the world meet in competition in the market in Liverpool, and the variance of a fraction of a cent will cause men to instantly, as fast as the cables can flash the orders, buy in one market and sell in another—why? Because the system of intelligence with regard to wheat production and wheat consumption, coupled with the present-day system of transportation, unites wheat market with wheat market, so that the farmer in Minnesota is competing with the rancher in Argentina and the wheat grower in Australia.

But, if there was no such system developed, the Minnesota farmer would sell his wheat to some local dealer or miller in blissful ignorance of the price in Liverpool. Grain would be bought and sold on the Chicago pit without regard to war, famine or any other market factor. And there would soon be no markets.

In the cattle business, buyers used to go out over the country from farm to farm buying stock. The price paid was subject to wide variations, depending upon the ignorance or knowledge of the farmer. The buyer himself was, from the present-day standpoint, poorly informed as to market conditions. To-day, when the farmer has at his command the newspaper, the telephone, the telegraph, the mail, with which to secure from day to day or from hour to hour information as to trade conditions, can it be said that there is less competition than there was? Competition is infinitely greater. In effect, where there were one or two traveling buyers bidding for his cattle, to-day from the various markets there are thousands.

Competition exists not only in business, it exists in every other activity that men engage in. Two men run a race. Will they better strive to win if they are blindfolded? Two men play at chess—what if neither one knows of the other's moves? Two armies take the field—

neither has an intelligence department. Will they fight better and to more purpose?

These questions seem foolish. They are foolish, but men holding office to-day have seemingly taken the view that in order to insure business competition, men must be ignorant; they should be kept in darkness as to what other men are doing. They fail to see that knowledge of market conditions enables men who know what other men are doing, to sell at lower prices, to extend larger credits, to give better service; in other words, to strive to attain the trade or commerce which the other man has or is seeking to secure, and that without such knowledge, with the farmer ignorant of market prices, with the grain broker ignorant of what other brokers are doing, with the exporter ignorant of prices in other countries, not only will there be little or no competition but trade will break down.

V.

THE PURPOSE OF THE ASSOCIATION OF HARDWOOD LUMBER MANUFACTURERS WAS NOT TO LIMIT COMPETITION OR TO RAISE PRICES, BUT TO FURNISH TO THE MEMBERS MARKET NEWS OF THE HARDWOOD LUMBER INDUSTRY.

THE TRADE SITUATION AS REGARDS HARDWOOD LUMBER.

In the present case, there are 329 defendant manufacturers of hardwood lumber.* These constitute about 28

Insert page 29.

* This should read: The membership comprehends a small fraction of the total number of operators producing hardwood lumber. The total production of the membership is but 28% of all hardwood lumber produced in the country.

the purposes which the Government claims it had in view, a very unwieldy body).

The evidence shows that not only were the mills scattered, but many of them were small and doing only a local business. There was not (nor is there now) any market for hardwood lumber such as there is for wheat, cotton, oats, corn, wool, or even fruits or vegetables. Each producer or manufacturer had the burden of selling his own production as best he could.

The evidence showed that about 51 per cent of the production of hardwood lumber was sold to wholesale dealers, and 49 per cent to the hardwood-using industries, such as furniture manufacturers, makers of automobiles, etc. A few manufacturers with large organizations could in a haphazard way keep in touch with the market situation. In other words, they could (but in an inadequate and unreliable manner) obtain information as to the facts of production, consumption, prices, stocks on hand, etc., which go to make up the forces of supply and demand. But the small producer without a large selling organization would be only illy fitted to deal with the buyers for the wholesale dealers and the hardwood-using industries. These would be much better informed of market conditions and better fitted to trade to their own advantage and to the small manufacturer's disadvantage and without benefit to the ultimate consumer.

The situation was similar to that which used to obtain in the cattle industry, when buyers would go out to the country buying live stock from the farmers, the farmer having little knowledge of real market conditions.

Such information as was furnished by the Government would be of little value, and from the nature of the busi-

ness, general sources of market news, such as the newspapers, could be of little help.

Such a situation could have but one result. Prices would vary greatly, some manufacturers would be overreached. Shortage in various lines could not be readily anticipated.

THE PURPOSE OF THE ASSOCIATION.

When the bare facts are considered, there was but one purpose in the organization of this Association.

These producers did not have adequate market information. There was no way to get it, except to collect it themselves. No one was collecting the facts for them. Many of the most important facts must, in the nature of things, be gathered from the lumber manufacturers themselves, as to production, stocks of goods, rate of consumption, prices, etc.

These facts the Association faithfully collected and fully and truthfully reported.

What was the real purpose of doing this? Merely to have market news with regard to their business—merely to enable the manufacturer of hardwood lumber in marketing his product to have at least the same kind of information that the Government and other agencies furnish to the grower of cotton, or of corn, such as the broker has in dealing in stocks or bonds, such as men dealing in every other great commodity either have furnished to them or with which they supply themselves.

But it is argued that these men were seeking higher prices. The Government charges that this alleged conspiracy in restraint of trade began in January, 1919, carefully placing its origin just before a rise in price of hardwood lumber (as well as of everything else). But

this plan under one of the predecessors of this Association, began March 1, 1917. (1 Rec., 46-47.)

When this Association was formed no man, unless he was omniscient could tell what would be the effect on prices.

On the 8th of next month the Bureau of Crop Estimates will send out its monthly bulletin. It may, like the bulletin of September, 1921, send up the price of cotton and start a revival of business throughout the whole South or it may further depress the price of that great staple. But, unless you know what that information is going to be, you cannot anticipate the effect of its publication and you cannot know what the information is until it is collected. In other words, there is no purpose of raising or lowering prices if the work is honestly done. There is only the purpose of furnishing men the facts from which they may themselves more accurately gauge the forces of supply and demand, each fully using his own judgment, and thereby enabling men to operate their business intelligently and not ignorantly.

The objection is made that some of these defendants praised the Association on the ground that by reason of the facts learned through the Association they were able to obtain better prices for their lumber. But that does not show that the purpose of the Association was to enable the members to obtain higher prices. The purpose of the Association was to furnish market news to the members so that each one might interpret those conditions for himself. Under certain conditions that would mean higher prices; under other conditions it would mean sales at lower prices on account of the reports showing accumulated stocks or a slackening demand. If prices were too low, taking into account actual market conditions, the Association was doing its members a

proper economic service when it brought the actual facts to their knowledge.

On occasions a few members stated, and several times the Secretary sent out bulletins stating that prices should be higher. Every morning paper publishes opinions of this kind. They do not fix prices and men sometimes follow them to their sorrow. They are merely an attempt to interpret market news.

In a recent edition of the Chicago Herald and Examiner, the following appeared:

"CLAIMS CORN CROP IS BILLION BUSHELS UNDER U. S. REPORT.

Nearly a billion bushels less corn available than estimated by U. S. Department of Agriculture! New crop may be 400,000,000 bushels less; supply of old corn on hand probably 500,000,000 bushels less.

Weight of oats so light that this season's crop in bushels of thirty-two pounds each is only about 60 per cent of last year.

Nearly 800,000 fewer acres of potatoes grown than the official estimate. Autumn weather must be favorable for crop to exceed 250,000,000 bushels, the smallest in about twenty years.

These sensational claims are made by Herbert Myrick of Farm and Home."

Would anyone claim that Herbert Myrick, the Farm and Home and its thousands of farmer subscribers are engaged in a criminal conspiracy? That great paper is merely endeavoring to furnish to its subscribers better market information than the Government bureaus, in order that they may act more intelligently, whatever that action may be. In this case the evidence shows that the whole plan was not an attempt to secure abnormal prices or artificial prices or even higher prices; it was merely an attempt to secure and furnish to the members market news with regard to hardwood lumber in order that the

manufacturers of that lumber might bring their selling operations into line with economic conditions, whether that meant low prices or high prices.

In the Chicago Herald and Examiner of September 24, 1921, the following appeared:

> "'Hold Your Wheat,' Secretary Hoover Advises Farmers.
>
> The American Farm Bureau Federation, in sending out advice to farmers to hold their wheat, quotes Secretary of Commerce Herbert Hoover as saying:
>
> 'We are over-marketing wheat and depressing prices unduly.
>
> At least 40 per cent of the wheat crop passed out of the farmer's hands during the first thirty days of the crop year.
>
> There can be no sound reason for any pressure on the farmer to sell in view of the liberal provisions for marketing credit both by the Federal Reserve Board and War Finance Corporation.
>
> The outlook for the export market is as good as last year at this time.'"

Does anyone suppose that the American Farm Bureau Federation was endeavoring to do anything besides give to its members the best possible advice on market conditions as well as market news of a reliable character?

For all that appears in this case, in its collection and dissemination of market news in regard to hardwood lumber, this Association was just as honest, just as disinterested, just as fair as is the Government Bureau of Crop Estimates or Secretary of Commerce Hoover in regard to the price of wheat. Their purpose, as well as the purpose of the Association, was to enable the producer to estimate supply and demand and to adjust his operations to economic conditions.

The Association is to be judged by its general purpose operating not to-day or to-morrow or this year or next

year, but as a permanent organization, sometimes giving out information showing a shortage and thereby stimulating prices, but just as honestly, just as carefully giving out information showing overproduction and falling prices. This Association was not organized for the purpose of revealing a shortage in hardwood lumber during the period arbitrarily selected by the Government. It was, in fact, organized almost two years before that period, for the purpose of showing trade conditions whatever they might be over a term of years, and by that purpose it is to be judged.

Much emphasis has been laid by the Government upon the sentence used by the Association—"Co-operation, Not Competition, Is the Life of Trade." As a matter of fact, ruinous competition, with the purpose of injuring a competitor and creating a monopoly, has been the death of trade, and is under the ban of the law and being hunted down by the Federal Trade Commission. *Market news* is the real life of trade, for without it, trade would languish and die, and in so far as co-operation enables men to collect and disseminte market news, it is the life of trade and the developer of commerce. The purpose of the association in using the phrase went no farther than that.

VI.

THE ASSOCIATION OF HARDWOOD LUMBER MANUFACTURERS IN THIS CASE DID NOT IN ANY WAY RESTRAIN TRADE OR COMMERCE.

In the Century Dictionary the word "restrain" is given the following meanings: "To hold back, to prevent, to confine, to hinder from liberty or action."

Locke, in his great "Essay on the Human Understanding," II XXI, Sec. 13, thus defines restraint:

> "Wherever thought is wholly wanting or the power to act or forebear, according to the direction of thought, there necessity, takes place. This, in an agent capable of volition, when the beginning or continuation of any action is contrary to that preference of his mind, is called compulsion; when the hindering or stopping any action is contrary to his volition, it is called *restraint.*"

In the leading case of *Mitchell* v. *Reynolds,* decided in 1711, 1 Smith L. C., 406 at 431, it was laid down that—

> "It is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade, according to his own discretion and choice, and no power short of the general law, ought to restrain his free discretion."

In other words, as long as men have freedom of choice there is no restraint. In the same way, as long as trade and commerce is allowed to flow freely and untrammeled, according to the free working of economic law, without artificial checks, trade and commerce are unrestrained.

In *U. S.* v. *Prince Line,* 220 Fed. 230, Judge Lacombe, in giving the opinion of the court, said (page 235):

> "From a study of the multitudinous decisions, not always harmonious, construing this act, the conclusion is reached that a violation of the act is not made out by theories of what will be the result upon trade and commerce of agreements entered into by defendants, or upon presumptions as to what may have been done under such agreements. *Some actual* unreasonable *interference with the natural course of trade* must be shown by proof."

In *U. S.* v. *Patten,* 226 U. S. 525, which was a criminal prosecution under the Sherman Anti-Trust Act charging a conspiracy to run a "corner" in cotton, the court held, that there was a conspiracy

"to enhance artificially its (cotton) prices throughout the country."

The court, speaking through Mr. Justice Vandeventer, said (p. 541):

"Section 1 of the Act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, *or to create artificial* conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein."

And on page 542:

"It (running a 'corner') also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition."

To the same effect is the decision of this court in *Eastern States Retail Lumber Dealers Association* v. *United States,* 234 U. S. 600.

In that case the circulation of what in effect was a black list of certain wholesale dealers in lumber, was declared illegal. There was not an express agreement by the members of the Association not to deal with the black listed wholesalers. The court held that it interfered with the "free and natural flow of trade in the channels of interstate commerce."

In the language used in the *Patten case, supra,* it created "artificial conditions" which the court held impeded interstate commerce. In Eastern States Case the court, speaking through Mr. Justice Day (p. 614) said:

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like

purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress," etc.

In other words, either by direct action as by agreement, or by creating artificial conditions which necessarily have the same result, trade or commerce is restricted; that is, the usual operation of the laws of supply and demand, is thwarted. Men are prevented from trading freely as they would otherwise trade and an artificial economic situation is developed. It is to be noted that in that case the only purpose which the Association could have had in circulating the information was to effect a boycott of certain wholesale dealers. Unlike the reports in this case, a blacklist could serve no lawful or innocent purpose.

In *U. S.* v. *Colgate & Co.* 250 U. S. 300, the defendant was indicted for violation of the Anti-Trust Act. It was charged with having distributed among dealers letters, telegrams, circulars and lists showing uniform prices to be charged for its products, urging them to adhere to such prices and notices stating that no sales would be made to those who did not; requests often complied with for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon "suspended lists"; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of and given

by other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

The Supreme Court, in its opinion (p. 305), quoted from the opinion of the lower court:

> "The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined to do so."

The Supreme Court, speaking through Mr. Justice McReynolds, then said (p. 306):

> "We cannot, *e. g.*, wholly disregard the statement that 'the retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company. * * *
>
> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade and commerce—in a word, to preserve the right of freedom to trade."

In the case of *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, the defendant had been indicted for violation of the Sherman Anti-Trust Act. The indictment al-

leged that it manufactured and sold valves, gauges and other accessories in connection with automobile tires. It also alleged that the defendant caused all the tire manufacturers and jobbers to whom it sold its product to execute with it uniform contracts which fixed uniform prices for resale and that the tire manufacturers and jobbers uniformally sold its products at the resale price fixed by it. The court below sustained a demurrer to this indictment. On review by the Supreme Court this was held error on the ground that the jobbers were obligated by the agreement to maintain prices. It was admitted that had the dealers been allowed "freely to exercise his own independent discretion" even if the manufacturer had indicated his wishes concerning prices and declined further dealings with all who failed to observe them, there would have been no restraint of trade.

In the case of *Frey & Son, Incorporated*, v. *Cudahy Packing Company* (decided by this Court April 18, 1921) suit was brought by Frey & Son against the Packing Company to recover three-fold damages under the Anti-Trust Act. It was alleged that the Packing Company as the manufacturer of "Old Dutch Cleanser" had entered into an unlawful contract, combination or conspiracy with various jobbers for the maintenance of resale prices.

Among other things, the trial court charged the jury:

> "I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it

out by themselves, selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

Mr. Justice McReynolds, speaking for a majority of the Supreme Court, said, after quoting this charge:

"The recited facts, standing alone (there were other pregnant ones) did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in *United States* v. *Colgate & Co.* As given, the instruction was erroneous and material."

In that case, it was admitted that the Packing Company had a sales plan which fixed the resale price of its product and that a majority of the jobbers followed its instructions, nevertheless, the majority of the court took the position that these facts were not sufficient to show that the jobbers were under any *obligation,* express or implied, to observe specified resale prices, and that therefore these facts were not sufficient to show a restraint of trade.

In the case at bar, the evidence shows that the members of this Association were at all times free to make any price for hardwood lumber which they pleased. There was no price-fixing committee, the Association did not advise them what they should charge. The member was subject to no criticism for asking what price he pleased. A member would not forfeit his place in the Association if he gave his lumber away; he was just as free to make any price [redacted] on his product as any business man in the country.

Except, says the Government—

(a) He knew there was a shortage;

(b) He knew what other members were receiving for lumber;

(c) He had the honest opinion of the Secretary as to trade conditions.

In this, however, the situation of a member was the same as any other business man. Every man knows, or tries to know the fundamental conditions of the market, as to the product he is dealing in. Every business man finds out the price of others before buying or selling; every business man gets advice of some kind or character in the operation of his business.

But, when all is said and done, the prices arrived at individually by each member of this Association were made as a matter of his own choice. Each member was under no other or different influences than any other business man.

Compare the situation of the members of this Association with that of the Cudahy Packing Co. and its jobbers in the case of *Frey & Son* v. *Cudahy Packing Co.*, cited above.

In that case information was given by the Packing Company to the jobbers as to the price at which they were to resell its product. There was and could be but one purpose in doing so, to fix the price. This Association collected and gave out to its members information as to trade conditions, the real purpose of which was to enable each member to make his prices in accordance with his own views of all economic conditions.

The Packing Company urged the jobbers to follow the resale price which it laid down. The members of this Association were not urged to ask any specific prices or even to ask higher prices, though a few members expressed their opinion that prices should be higher. The jobbers undoubtedly knew that if they failed to follow the advice of the Packing Company they would incur its displeasure and that probably it would cease dealing

with them. In this Association the member not only was left free to adopt any price which he pleased for his lumber, but he might give it away if he wished without incurring the censure of anyone or of forfeiting his membership in the Association.

Since the trade information gathered and disseminated by this Association was true and each member was at all times free to take whatever action he might see fit, it seems clear that under the authority of these cases there was no restraint of trade or commerce.

But, the Government shows that prices of hardwood lumber rose during the year 1919 and early in 1920, and jumps to the conclusion that this Association caused it. But it forgets that the prices of everything else in this country rose in equal or greater degree during the same period. It overlooks the fact that these defendants controlled only a part of the hardwood lumber production, they claim not more than 28 per cent.* What other pro-

*** The meaning is that the Government produced no evidence showing what non-member producers received for their lumber, as distinguished from the price data in the sales report. In passing it is worthy of note that the defendants supplied abundant evidence of this character whereby it is shown that the prices of members were in line with prices received by non-members.**

(Insert page 43).

riod an artificial influence is indicated; if they vary during such period it is a consequence of competitive conditions. *It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something*

> *surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution.* Of course competition affects prices, but it is only one among other influences, and does not more than they, register itself in definite and legible effect." (Italics ours.)

In other words, the cause of high prices cannot be determined in any offhand fashion.

If the prices made by each producer were the prices reached by him in open bargaining, if each producer was at all times free to buy or sell at any price he pleased—if the prices were not artificial, but were in line with economic conditions, how can it be claimed that there was any restraint in any degree of trade or commerce whether prices were high or low.

In the case of *Standard Oil Company of New Jersey et al.* v. *U. S.* 221 U. S. 1, at page 62, the Supreme Court, speaking through Mr. Chief Justice White, said:

> "In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract."

VII.

IF THE PLAN OF THIS ASSOCIATION IN ANY WAY INVOLVED A RESTRAINT OF TRADE, IT WAS AN INCIDENTAL RESTRAINT AND NOT DIRECT AND IMMEDIATE

In the early case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, the court, speaking through Mr. Chief Justice Fuller, laid down the rule, from which the court has never departed, that to be within the inhibition of

the Anti-Trust Act a restraint of commerce must be direct. The court said (p. 17):

> "There was nothing in the proof to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

In *United States* v. *Joint Traffic Association,* 171 U. S. 505, at 568, the court said:

> "The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In *Hopkins* v. *United States,* 171 U. S. 578, the court laid down the rule (p. 600):

> "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

See also in this connection—

Anderson v. *United States,* 171 U. S. 604.

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, the court held that an agreement between manufacturers of steel pipe not to bid against each other was unlawful, because its direct and immediate effect was to destroy competition between them and thereby raise prices, and stated (page 244):

> "that when it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed

for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce was only indirect and incidental."

In the case of *U. S. Fidelity & Guaranty Co. of Baltimore* v. *Commonwealth of Kentucky*, 231 U. S. 394, the Supreme Court held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state, was not unconstitutional as a burden upon Interstate Commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the State. The contention was that the service rendered through the representatives in Kentucky, and other representatives of the same kind, acting as agents of merchants engaged in interstate commerce, by furnishing them with information through the mails, or by telegraph or telephone, as a result of which merchandise might be transported in interstate commerce, or withheld from such transportation according to the character of the information reported, was so connected with interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business. But this contention the Supreme Court denied.

The information collected and distributed by this Association was no more closely connected with Interstate Commerce than the credit information collected by United States Fidelity & Guaranty Co. of Baltimore.

In the present case, the purpose of the members of the Association was to collect information in regard to the hardwood lumber business and to disseminate this information. The information so collected and disseminated was true. It was not "faked" or "edited," or in

any way "manufactured." The Association was not organized for a day or a month or a year, but was organized as a permanent organization.

Moreover, if the publication of this information during the special period of lumber shortage *arbitrarily selected by the Government* tended to increase prices and thereby to restrain trade (which we do not admit), still, that was merely incidental to a peculiar "adventitious" situation. No one can contend that the publication of trade information will always tend to bring about higher prices because every one knows that such information may have an exactly opposite effect. Unless higher prices necessarily and always result from the operation of the Plan, then if higher prices result at some particular time, such a result is incidental and not necessary and direct. As this court said in *U. S.* v. *U. S. Steel Co.* 251 U. S. 417, 442:

> "The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances."

VIII.

IF THE PLAN OF THIS ASSOCIATION IN ANY WAY INVOLVED A DIRECT RESTRAINT OF TRADE, IT IS NOT WITHIN THE INHIBITION OF THE ANTI-TRUST ACT BECAUSE IT IS NOT AN UNDUE RESTRAINT OF TRADE.

Standard Oil Co. v. *United States,* 221 U. S. 1.
United States v. *American Tobacco Co.* 221 U. S. 106.
Board of Trade of the City of Chicago et al. v. *United States,* 246 U. S. 231.
United States v. *United States Steel Co.* 251 U. S. 417.

In the *American Tobacco Co.* case, referring to the decision in the Standard Oil Company case, the Supreme Court said, through Mr. Chief Justice White (page 179):

> "Applying the rule of reason to the construction of the statute, (Anti-Trust Act) it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrain trade, that the words as used in the statute were designed to have and did have but a like significance. It was, therefore, pointed out that the statute did not forbid or restrain the power to make *normal* and *usual contracts* to *further trade* by resorting to all normal *methods*, whether by agreement or otherwise, to accomplish such purpose."

In the case of *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, the Board of Trade had adopted a rule prohibiting its members from purchasing or offering to purchase, between the close of the "call" and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the "call."

The court, speaking through Mr. Justice Brandeis, said (page 238):

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as *merely regulates* and perhaps thereby *promotes competition* or whether it is such as may suppress or even *destroy* competition. To determine that question the court must ordinarily consider facts peculiar to

the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The court said further (page 240):

"But within the narrow limits of its operation the rule helped to improve market conditions thus:

(a) It created a public market for grain 'to arrive.' Before its adoption, bids were made privately. Men had *to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.*" (Italics ours.)

As has been pointed out, the primary purpose of this Association was the collection and dissemination of trade information for the carrying on of trade, and that if any restraint resulted it was incidental to that purpose.

Was an Association such as this a normal and usual method of furthering trade? There is certainly nothing unlawful in the Association itself.

In *Gompers* v. *Buck's Stove & Range Co.* 221 U. S. 418, the Supreme Court, speaking through Mr. Justice Lamar, said (p. 439):

"Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes."

As has been pointed out, Trading Associations, guilds of craftsmen, guilds of merchants, were well known in England centuries ago. Such organizations were certainly regarded at the Common Law as a normal and usual method of furthering trade.

The great association of marine underwriters known as Lloyd's, which is probably the greatest commercial institution in the world, has been in operation for over two centuries, collecting and giving out to its members information of every kind and character affecting shipping and marine insurance as well as rates.

By telegram, cable and wireless Lloyd's is kept informed every minute of the day and night of the movements of all ocean-going ships and of all casualties. Reports come in at the rate of three or four thousand every twenty-four hours and are sifted, posted, and circulated to subscribers as well as published in Lloyd's List. So that it is said that not one vessel in ten thousand ever reaches a British port without being reported to Lloyd's. The intelligence system is so highly developed that any member can ascertain almost immediately the exact whereabouts of any given ship, the dates of her arrivals and sailings, where she was last spoken with, and any other incident of her voyage. It must be remembered that the members of Lloyd's are marine insurers, to whom such information would be of even greater importance than the information collected by this Association of hardwood lumber manufacturers would be to its members, because shipping news will have a very immediate influence on the rates of marine insurance.

Is it possible that for two centuries the association known as Lloyd's has been restraining British trade and commerce until to-day such commerce covers every sea? If so it is strange that the British Parliament and British people have never found it out.

If by any perversion of language this could be called "restraining trade or commerce," it is submitted that it is a *normal* and *usual* method, having for its ultimate purpose the promotion and development of trade and commerce rather than its restraint.

As has already been shown, information as to prices received, stocks of goods on hand and market conditions collected by this Association, have always been secured by men in a greater or less degree before they would buy or sell; that it is absolutely necessary in any real competition. If so, it is not unreasonable, and therefore not unlawful.

IX.

WHERE THE ACTS ARE NOT THEMSELVES UNLAWFUL, AN UNLAWFUL INTENT, COUPLED WITH A DANGEROUS PROBABILITY THAT THE LAW WILL BE VIOLATED, MUST BE SHOWN BEFORE THE COURT SHOULD ACT IN RESTRAINT UNDER THE ANTI-TRUST ACT.

Swift & Co. v. *U. S.* 196 U. S. 375.
U. S. v. *St. Louis Terminal,* 224 U. S. 383.

The leading case on the question of intent under the Sherman Anti-Trust Act is *Swift & Co.* v. *U. S., supra,* which was a case where a dominant proportion of the dealers in fresh meats throughout the United States entered into a combination not to bid against each other in order to regulate prices and induce shipments to live stock markets in other states, to restrict shipments, establish uniform rules of credit, to get less than lawful rates from railroads to the exclusion of competitors, with the intent to monopolize commerce among the states.

Many of the acts complained of were lawful, but this court took the position that the several acts charged were bound together as the parts of a single plan to monopolize commerce, and that the plan made the parts unlawful. But it is also clear that under the doctrine of that case an intent is not sufficient of itself. It must be coupled with a dangerous probability that the evil

result will be brought to pass. A supposed unlawful intent is not sufficient to make lawful acts unlawful unless there is some reasonable likelihood that the lawful acts, when carried out with the unlawful intent, will accomplish the unlawful purpose.

As Mr. Justice Holmes said, in *Swift & Co.* v. *U. S.*, *supra* (p. 402):

> "Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree."

In other words, of probability. In that case there was no question but that the means proposed were adequate to accomplish the unlawful result, that is, the monopoly of the trade in fresh meats.

In the present case, as has already been shown, there was no unlawful intent. The brief of the Government (page 73, as well as in other places), speaks of the Association as a "conspiracy having the purpose and effect of suppressing competition and maintaining and enhancing prices." But there is no evidence of any intent of suppressing competition. There were none of the methods ordinarily used for that purpose. None of the 329 defendants in any way surrendered their liberty of action as to business to be sought or prices to be charged. As far as this record shows, each one during the period in question was just as honestly seeking business as any business concern has ever done.

The intent of the defendants in organizing and operating the Association is to be determined by what was in the minds of the members before the information as to lumber trade conditions was collected, when it could not be determined whether the information would show a shortage or a surplus of hardwood lumber, whether the

information would naturally have a stimulating or a depressing influence on lumber prices.

So that fundamentally the real intent of the Assocation was not high prices or low prices, but the intent was to give to the members such information of market conditions that prices of hardwood lumber might naturally adjust themselves in accordance with supply and demand; that the manufacturers of hardwood lumber might be at no disadvantage in selling their product; that the forces of supply and demand might operate freely and naturally.

But, there was no dangerous probability or even any probability that the Plan would result in higher prices. Until the information was collected, no one could tell what it would be. If it was known by the members in advance, there would be no need of collecting the information, for they already had it, and collecting it and sending it to them could have no effect on prices or on anything else.

But, if it was not known whether the information would really stimulate or depress prices, then higher prices were not a necessary result of its operation. It might just as often depress prices.

An Association of this kind must be judged by its effect over a term of years. Just as the information collected and given out by the Bureau of Crop Estimates sometimes stimulates an advance in the price of wheat, at other times it tends to depress prices, but always it tends to bring prices to the level warranted by fundamental economic conditions and thereby promotes and developes production as well as trade and commerce.

Reliance is also placed by the Government on the case of *Addyston Pipe & Steel Co.* v. *U. S.* 175 U. S. 211. But the court in that case was dealing with an Association

which limited competition, thereby securing higher prices by *artificial* methods which could have but one result, which is a very different thing.

High prices which are the natural result of economic conditions, are not only lawful, but are for the best interest of the community, for they stimulate production and so the economic balance is restored.

The fact which must always be kept in mind is that the facts collected and distributed by this Association were *true*, and if prices rose they were merely in line with economic conditions. They were in no sense artificial or arbitrary.

A rise of prices, if in response to economic conditions, does not restrain commerce, but promotes it. The whole South was recently under the blight of low prices for cotton. When the price of cotton rose during the early part of September, 1921, commercial activity of every kind revived in all the southern states, the beneficial effects reaching every part of the country.

It is only prices *artificially* raised which disorganize and restrain commerce.

X.

LAW.

THE SHERMAN ANTI-TRUST ACT IS A HIGHLY PENAL STATUTE AND PROOF OF ITS VIOLATION SHOULD BE CLEAR, POSITIVE AND CONVINCING.

Northern Securities Company v. *United States*, 193 U. S. 197.

United States v. *Reading Co. et al.* 183 Fed. 427.

Union Pacific Coal Co. v. *United States*, 173 Fed. Rep. 737.

U. S. v. *Swift*, 188 Fed. Rep. 92, at 96.

In this case the defendants are charged with the commission of a crime, and on that foundation the Government asks that they be enjoined from further violation of the law. The most elemental principle of justice requires that the facts relied on by the Government for proof of its case and as a support of its prayer for an injunction, shall not be merely suspicious circumstances, but that they shall be absolutely inconsistent with the innocence of the defendants.

Northern Securities Company v. *U. S.* 193 U. S. 197, Mr. Justice Holmes dissenting, 401:

> "The statute of which we have to find the meaning, is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and in another way in (one) which it seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. I am no friend of artificial interpretation because the statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail."

Even though the foregoing statement is included in the dissenting opinion, it is not at variance with all decisions regarding the interpretation of the statute in this particular.

In *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, which was a criminal prosecution under the Federal Anti-Trust Act, the court said, speaking through Judge Sanborn (page 740):

"There was a legal presumption that each of the

defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the Government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction." (Citing many cases.)

In *U. S.* v. *Swift et al.* 188 Fed. Rep. 92, at p. 96 (Criminal Prosecution), Judge Carpenter, in a careful opinion, sustaining the indictments, and designed to show that prior decisions sustaining injunctive remedies were applicable to the judicial construction of the act as a criminal statute, said:

> "The Sherman Act is primarily a criminal statute. Its title announces its purpose. * * * Here the jurisdiction of the equity courts is made dependent upon the criminal sections. If Sections 1, 2, and 3 were repealed by Congress there would be nothing left of the law to which Sections 4 and 7 could apply. It is impossible to give effect to the equity sections without reference being had to the criminal section. It authorizes the processes of the Chancery Court to be used only to prevent the carrying out of that which is declared in the prior sections to be criminal. It follows, therefore, *that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that unless that which is sought to be enjoined is a crime, it cannot be enjoined, because it is only that which is made a crime by the statute which is subject to the equity jurisdiction.*"

Even if the Government should not be required to prove these defendants guilty beyond a reasonable doubt because the form of action is by a bill in equity instead of indictment, nevertheless, it must be remembered that,

although it is in form an equity proceeding, it is not in reality a proceeding in equity, but is a statutory proceeding to enforce a criminal Act. The charges of the Government's claim are that these defendants conspired to violate, and did violate, a criminal statute. While in this proceeding these defendants are not liable to fine or imprisonment, yet, if the decree of the court be against them, they will be branded as criminals, their business injured and their Association would be destroyed. With such issues at stake, the court, whatever its name or form, if it is to be a court of justice, must have clear and convincing proof that the law is violated. It has no right to act upon a guess, surmise, or suspicion, and if there is any doubt, it is to be resolved in favor of those accused of the crime. We have not reached a place, even in the prosecution of business men, where they are under the burden of proving their innocence.

XI.

IF THE PLAN ITSELF IS NOT FUNDAMENTALLY ILLEGAL, AND IF THE VIOLATION OF THE LAW GROWS OUT OF ADMINISTRATIVE METHODS WHICH MAY BE ELIMINATED, THE DECREE SHOULD BE LIMITED TO THOSE METHODS AND NOT TO THE WHOLE PLAN.

United States v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383.

In this case the United States brought suit to dissolve the Terminal Railroad Association of St. Louis, as a combination in restraint of trade. This Association, which was a Missouri corporation, had united in one ownership three terminal companies, which as a result of inherent local conditions ("physical and topographical") constituted a monopoly of terminal facilities. Certain railroads were excluded from the use of the termi-

nal or compelled to submit to unreasonable exactions. The court held, however, that the Association should not be dissolved, but that it should be made the impartial agency of all the roads, and that other abuses incident to operation should cease. The court said (p. 410):

> "If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated, and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former, the *bona fide* agent and servant of every railroad line, which shall use its facilities, and an *inhibition* of *certain methods* of *administration* to which we have referred, will amply vindicate the wise purpose of the statute and will preserve to the public a system of great public advantage."

In the case of *Swift & Co.* v. *U. S.* 196 U. S. 375, the injunction of the court below had the following paragraph which was not changed by the Supreme Court (footnote, page 394):

> "But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets."

In other words, the thing which was lawful disassociated from an unlawful purpose was not enjoined.

In the instant case, the Government in its brief, page 88, says:

> "Of course, there is no question but that such

right (of persons engaged in business to share information) exists, and may be exercised, excepting where curtailed by statute. It is our position that the exercise of such right pursuant to a conspiracy to suppress competition and maintain and enhance prices is curtailed by the Sherman Anti-Trust Act."

But the injunction of the court below prevents these defendants from collecting and disseminating trade information for any purpose whatever, going away beyond the theory of the Government.

CONCLUSION.

In this case we have felt that it was necessary to go into a discussion of economic theory, for it is only by the aid of sound economic theory, by a correct understanding of the operations of commerce, that the Sherman Anti-Trust Act can be interpreted.

That which the Government has seized upon with suspicion, is not abnormal, it is the usual and from time immemorial the customary method of carrying on commerce. Knowledge is the first essential of commerce; it is absolutely necessary to competition. It enables men to bring prices into proper relationship to supply and demand. It makes possible the freest play of economic forces. If so, it is not, it cannot be unlawful for men individually, or co-operatively, or by governmental action to secure and use such information.

Formerly, Trickery and Deceit, as well as Ignorance and Credulity, were well known figures in the Market Place. To-day Honesty and Fair Dealing are the patron divinities which men have set up. These are potent figures only where knowledge abounds.

Respectfully submitted,

WILLIAM J. MATTHEWS,
HUGH T. MARTIN,

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William J. Matthews,
Hugh T. Martin,
Attorneys Amici Curiae.

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The supplemental brief filed in this case by counsel for the Government, received by the undersigned since printing their brief as *amici curiae* contains an argument commencing on page 150 thereof against the entire reporting plan used by any and all trade associations, relating in any way to the collection and distribution of any or all kinds of trade statistics. The argument goes entirely outside the facts in this case and assumes that this Court will take judicial knowledge of not only the existence of all other associations of every kind, degree, and character, but also of the varied activities of such associations whether they have confined themselves to the original purpose of the plan or not.

Obviously this Court will not depart from its established functions and lend itself to such an appeal and consider "suspicion" outside the record. It is not possible to do justice to appellants or those who are directly involved in the decision of this case by considering "all the literature" (referred to by counsel) upon this subject without such persons having "a day in court" regarding such wholly extraneous and "suspicious literature" and circumstances.

Counsels' brief does serve the purpose, however, of making clear the fact that the Government's case rests not upon facts proven, evidence, but rather upon surmise, gratuitious assumption.

The excerpts quoted from "The New Competition" by the late Mr. Arthur Jerome Eddy, do not do justice to even that book, nor reveal a correct interpretation of that author's principles, even conceding for the moment that it may be material. If that book be material, its true purport can only be understood by reading all of at least certain chapters of it.

"The New Competition", first edition, was written about 1912, and later revised at different times in subsequent years prior and at the time of the debates in Congress concerning the Clayton Bill. From about 1911 on many of the States were debating and passing laws which made certain designated competing methods not merely unfair but unlawful because they were conducive to monopoly. Many of those state laws are referred to and discussed in "The New Competition." The Clayton Act was passed by Congress October 15, 1914; the Federal Trade Commission Act became law September 26, 1914.

Both of these laws, particularly section 2 of the Clayton Act and section 5 of the Federal Trade Com-

mission Act, were directed at specific *methods* of competition now generally recognized to be characteristic of the so-called Old Competition, in contradistinction to the New Competition. A very large number of the States passed similar laws, and, as shown by the Congressional Committee's report on the Clayton Bill, the Clayton Act was to supplement those state laws.

The numerous rulings of the Federal Trade Commission and judicial decrees based on the foregoing laws have had the effect of codifying certain trade practices as unfair and, therefore, unlawful. Consequently, just to the extent that such practices and methods were regarded as normal and essential ingredients of the kind of competition demanded by the Sherman Anti-trust Law, that kind of competition has been modified, —not by associations nor the principles of "The New Competition", but by the laws, rulings, and decisions themselves.

Some of the methods denounced by those laws, rulings, and decrees are:

(1) Price discrimination.
(2) False advertising.
(3) Misbranding.
(4) Commercial bribery.
(5) Tying and exclusive contracts.
(6) Buying out competitors to eliminate competition, etc.

(1) Price discrimination under section 2 of the Clayton Act, between different purchasers of commodities with the effect of lessening substantially competition or tending to create a monopoly, is illegal. (The provisional clause to that section of the Act does not alter the principle here being discussed.)

Under the Commission's rulings and Court decisions this law is confusing to the business man and difficult of application. Price discriminaton in this behalf is quite analagous to "local price cutting." Instances are not infrequent when prices should be lowered locally but not generally, yet if done one may be in danger of "flying in the teeth" of the statute or at any rate a Federal Trade Commission representative, clothed with plenary "search and seizure" powers, would appear on the scene and dictate what business policy should be adopted.

On the other hand, if local price cutting be not indulged, a representative of the Department of Justice would say, "Your prices are suspiciously in accord and cannot be so except for an agreement."

(2) False advertising and (3) misbranding of commodities are merely vicious methods of endeavoring to undersell a competitor but at the same time not giving to the public value. Such methods are unfair and since 1914 illegal by law. Such methods belong to the past, Old Competition, and have no place in this, our more enlightened day,—New Competition.

(4) Commercial bribery. The report of the Federal Trade Commission for 1918 bitterly and vehemently denounced "commercial bribery" and recommend federal legislation not only to prohibit the same but to make it a crime. It is regarded as unfair and therefore illegal.

Commercial bribery includes all forms of secret rebating, selling a customer ostensibly at one price but handing him a rebate either in money or by secretly giving him an additional amount of goods; bribing by salesmen of customers' employees through entertainment or otherwise. Representatives of the Federal Trade Commission have even checked hotel bills and

then warned salesmen that they were spending too much money for entertainment of customers. The Federal Trade Commission's files abound with such cases.

Commercial bribery is merely a secret method of cutting the price. It is always done in the dark, but always sooner or later discovered by a competitor, and tends toward ruinous competition.

(5) Tying and exclusive contracts. Most certainly there could be nothing wrong about a member stating in open meeting that he had not made, nor did he intend to make, any such contracts. They have been declared illegal.

(6) Buying out competitors. Associations can surely protect their members to the extent that they will not advocate buying out smaller units for the purpose of eliminating competition.

Counsel in their brief state that competition should be "fair." If that be true there should be no objection to the adoption of any method which would eliminate the foregoing unfair methods of competition, even though the same might result in the stabalization of prices at more normal levels, the elimination, to such an extent, of ruinous competition, and that too even though it might result in larger profits. "The New Competition" advocates publicity of things done for the purpose of eliminating merely those ugly features and methods of competition now classed as unfair and not the restraining, in any wise, of real, true, intelligent competition.

Ruinous competition is no longer the ideal as it was that of the nineteenth century economists. It is economically unsound,—meaning thereby not beneficial to the public, for reasons well known. It drives out the weaker, smaller industrial units; the resulting losses are recouped by the larger surviving industrial units through greatly disproportionate enhanced prices.

We hear much (not by modern economists, as counsel state) about free, unlimited, unbridled competition, and, from the school boy orator, that regulator of fair prices and fair profits. During the last ten and twenty years standard economic works all tell us that there is no such thing as *free* competition; that it is a misnomer; that the term is merely used for logical deductions only and not otherwise. Differences in locality, differences in reputations regarding a particular brand of goods, or reputation of a company, reasonable restraints, cognizable at common law and engrafted upon the Sherman Law by judicial decisons, modifications by statutory law and bureaucratic rulings,—all have adulterated "Free" as applied to competition.

Regardless of these modifications, or, as one governmental official said, "ethical tempering" of competition, continually enjoyed upon business men, there are those who fail to admit that such changes in competition have been taking place and do now exist. Such officials contend that the Sherman Law demands "the good old-fashioned methods," which must mean, if it means anything, Old Competition without any of the above modifications. Such officials are merely "out of tune with the Infinite." They do not correctly interpret extant conditions, economic and legal. They cannot or do not see the "hand-writing on the wall."

Theoretically the law recognizes no gradations of competition whatever. Likewise, New Competition countenances no inroads upon competition. But this does not solve the problem. It is a mere question begging conclusion, assertion, a *cul de sac.*

The query is, What kind of competition is the public entitled to? The question necessarily implies a de-

parture from the simon pure Free Competion. In so far as certain methods are condemned as above, the departure is not only justified but is legal, and if not observed, illegal. The lot of the average business man is truly most enviable! He is lacking in a wholesome respect for the law because he knows not what to do nor what not to do? His dilemma is created by administrative officials who refuse to admit the existence of the foregoing changes in methods of competing.

Counsel state on page 153 of their brief:

> "It has been recognized in every decision of this court construing the Anti-Trust Act that its object was to preserve competition, as it was and has been defined by Adam Smith and all political economists since his time."

What is meant by "preserve competition"? Undoubtedly, the idea intended to be conveyed is the preservation of such competition as had not been modified as above referred to. If so, the statement is wholly incorrect. There is not an economist or court in the country today who would not eliminate "cut throat competition" to the extent that it could be achieved through the elimination of the above mentioned methods, which would "preserve competition" of the right sort, present day legal competition,— intelligent competition,—New (not Old) Competition. Competition still, but devoid and bereft of brutal, ugly, yes, ruinous to acertain degree, characteristics. That is all New Competition means and open price associations stand for.

True, economists today would go further and eliminate all competition that is ruinous even though it be practiced by methods not yet denounced by law. Mr.

Eddy in his book, when writing as an economist, likewise urged the adoption of such principles when they could be legally done, as shown by excerpts hereinafter quoted, but he makes himself perfectly clear that to restrain competition in any way, or to any extent other than by eliminating the bludgeon tactics such as have been referred to in many of the cases, could not be legally done by an association or otherwise. So it is manifestly unfair to Mr. Eddy's book not to distinguish between those things advocated as economically sound, but not claimed to be yet legal, and those things claimed to be now legal.

When these things and this distinction be observed, it becomes readily apparent that Mr. Eddy did not misconceive the objects of the Anti-trust Act, nor does "the whole book breathe the bitterest antagonism to the Anti-trust Act."

Now, what is the purpose of the above mentioned legally demanded modifications of competition such as preventing discriminatory prices, commercial bribery, etc.? Primarily, to make one competitor be fair to another competitor so that the small unit will not be compelled to appear upon the bankruptcy side of a court; so that the smaller units can remain in business and help relieve the unemployment situation.

Truthful reports of the kind in question exchanged through an open price association will eliminate illegal, discriminatory prices and secret rebates, and to that extent also will curtail ruinous competition. Yet the attorneys for the Government would not permit the indulgence of even these legal methods through an association for the protection of the weak against the onslaughts of the strong.

The argument of the Government's attorneys is totally and wholly at variance with the actual facts in

all strictly open price associations, especially during the last two years of declining markets, and ATTACHES AN UNWARRANTED AND ABNORMAL SIGNIFICANCE TO THE COOPERATIVE AND TOO LITTLE IMPORTANCE TO THE COMPETITIVE PRINCIPLE; THE LATTER IS TOO DEEPLY EMBEDDED IN HUMAN NATURE TO BE SO SIMPLY ERADICATED, ROOT AND BRANCH, AS SOME PEOPLE WOULD HAVE US BELIEVE. On a declining market, when there is not enough business to go around, business men will go after the business and take an operating loss to keep intact their organizations rather than a shut-down loss. Such has been the history of practically every business organization during the last year. If it be necessary to cut the price to get business, the price will be cut, association or no association, and the intelligent business man would rather pay to belong to an association and receive accurate, reliable, dependable knowledge of the reduced price than to compete against himself because of a false statement given to a salesman by an unscrupulous buyer.

If the open price association eliminates the tendency toward ruinous competition growing out of misunderstandings and false representations of purchasers, who brazenly and by innuendo lead a seller to believe they have a lower price than they in reality have, it is not only legal but laudable and enhances the purchaser's chances of entering the Kingdom of Heaven whose portals Saint Chrysostrom thought a trader would never enter. Having accurate information, he can really compete; otherwise he cannot compete. The public is not entitled to psuedo competition based upon false representations. That is Old Competition, not New. Business is developing a soul because of the thus

"ethical tempering" of competition in response to the mandates of the law. Trickery and chicanery belong to the Meades and Persians. The ancient Greeks considered commercial deception as an appropriate guardian and protector. Cicero eloquently stated in the Roman forum that a venditore, merchant, must practice deceit and fraud to succeed.

Counsel have quoted Adam Smith as advocating such Old Competition. Even Adam Smith said that trickery and deception were essential ingredients of a trader's success. Imagine Professor Taussig of Harvard University in his 1920 Principles of Economics stating that such were requisite to succeed today! Full publicity corrects many competitive evils and prevents cutting of prices through such old methods of competition as are now unlawful, and thereby, enables the trader to get more money for his goods, but not more than the true economic facts warrant. That is all the public wants or can claim.

The following excerpts from "The New Competition" should be read in connection with the passages quoted in conusels' supplemental brief. From these quotations it will be observed just what kind of cooperation could be legally adopted and to what extent Old Competition could be, had been and is being altered by "New Competition."

In the new edition 1914 of "The New Competition" statements are made as follows:

Page 59:

"In a recent speech of Senator La Folette said:

"'An example of unfair and discriminatory prices is the practice so brutally employed by the

Standard Oil Company of cutting prices in local markets invaded by small competitors while keeping up prices in other markets not so invaded. Another example is that of making a lower price to the purchaser who does not buy of a competitor than the price demanded if he buys also of a competitor.' "

* * * * * *

"The practices complained of are right or wrong irrespective of the parties who resort to them. Now, what are those practices in plain, un-Senatorial English?

"1. That a manufacturer or wholesale dealer who finds a new competitor in a locality quoting low prices meets the local competition without reducing his prices in other places.

* * * * * *

"2. That a manufacturer or wholesale dealer makes special terms to the customer who will agree to buy exclusively from him."

Page 60:

"In short, the practices complained of are the very A, B, C, of the *old* competition, of that "free and unfettered" competition that the Sherman and state anti-trust laws are *popularly* supposed to protect and foster."

Page 62:

"But the question is broader than one of mere political or legislative, or even economic, expediency. It is a question of progress toward higher ideals in the industrial and commercial world, of the suppression of unfair, oppressive, "brutal" methods, in so far as it lies in the nature of man

to suppress them. *It is the question of the substitution of a new competition for the old.*"

Page 68:

"How far and how rapidly the country has drifted from the fundamental propositions of the old competition is indicated in the terms of a decree enterel last October in the Circuit Court of the United States vs. General Electric Company, and other makers of electric lamps."

* * * * * *

"The crucial propositions are as follows:

"1. '*The defendants and each of them are enjoined from making any contracts with parties from whom they purchase supplies and machinery used in the lamp business, whereby such parties shall bind themselves not to sell such supplies and machinery to other parties, or whereby such parties obligate themselves to sell to defendants at different prices than they sell to other customers.*'

"It will be observed that the injunction runs not only against the combination of defendants, but against *the liberty of each* to do things that have been done from time immemorial under the *old* competition."

* * * * * *

Page 69:

"Such are some of the sacred tenets of the *old* competition; the decree makes sad havoc of these notions.

"2. '*Defendants and each of them are enjoined from entering into any contract with dealers or consumers who by certain improved filament lamps*

whereby such dealers or consumers must purchase all the ordinary filament lamps they need as a condition to obtaining the improved; nor can any one of the defendants discriminate against any dealer or consumer who wishes to purchase improved filament lamps because such dealer or consumer buys ordinary lamps or other improved filament lamps from other dealers.' ''

* * * * * *

Page 70:

"Up to the entering of the decree who would have believed it possible that any court would intervene and say the manufacturer could not make such a contract?"

Page 71:

"3. '*The defendants and each of them are enjoined from offering or making more favorable prices or terms of sale for incandescent electric lamps to the customers of any rival manufacturer or manufacturers than it at the same time offers or makes to its established trade where the purpose is to drive out of business such rival manufacturer or manufacturers* * * * *provided that no defendant is enjoined or restrained from making any prices for incandescent electric lamps to meet, or compete with, prices previously made by any other defendants, or by rival manufacturers.*' "

Page 72:

"In its general application the decree overturns the theory of the old competition; it limits a man's

right to sell what he owns to whom he pleases on such terms as he pleases. It says, in so many words, that in all he does he must consider his rival—that is the striking novelty of the decision."

Page 74:

"to fight by engaging in a trade war, by going out and underselling in the rival's territory, for the express purpose of suppressing him, is contrary to the decree, though such a course is instinctive and natural and is the old competition in its most familiar form."

Page 75:

"This statute (Texas) recognizes broadly certain propositions that are fundamental to the new competiion:

"1. No man has the right to give away goods to injure competitors.

"2. No man has the right to sell goods at less than cost to injure competitors.

"3. No man has the right to sell goods "in such a way" as will injure competitors.

"Under the old competition it is considered not only legitimate but cunning and commendable to do all these things.

"And furthermore if any association of manufacturers, engaged in interstate commerce, should *agree among themselves* not to do the things forbidden by the Texas statutes—in short, *to obey* that law— *they would be liable to prosecution and imprisonment under the Sherman Act*—such is the delightful confusion of our laws upon the subject.

"Massachusetts has a statute which makes it a criminal offense for any person or corporation to 'make it a condition of the sale of goods, wares, or merchandise, that the purchaser shall not deal in the goods, wares, or merchandise of any other person, firm or corporation.'

* * * * * *

"The Supreme Court of Massachusetts held the statute constitutional and sustained the conviction of the agent of the company, saying, '*It is intended to make it impossible for a seller to say to an ordinary purchaser who buys to sell again, "You cannot buy my goods except on condition that you will not sell goods obtained from others. If you sell like goods manufactured by others you cannot have mine."*' Commonwealth *vs.* Strauss, Mass., 74 N. E. Rep. 308.

"And the court very rightly remarked, 'There is no doubt that the statute puts a limitation upon the general right to make contracts,' but justifies it as an attempt to meet modern conditions.

"When a similar contract made by the same tobacco company was presented to the Federal Circuit Court of Appeals in St. Louis the three judges —one of whom, Judge Van Devanter, is now a Justice of the Supreme Court—held that the right of the tobacco company to dictate the terms upon which it will dispose of its product '*is indispensable to the very existence of competition. Strike down, or stipulate away that right, and competition is not only restricted but destroyed.*'

"That which is forbidden by decree of court in Ohio, and is a crime in Massachusetts and Texas, is legitimate business practice Missouri.

"What is the trouble?

"Nothing but the conflict that is now on between the Old competition and the New; the old finds

expression in the judgment and opinion of the court in St. Louis; the new finds utterance—not as clear and logical as might be—in the decree of the court in Cleveland and in the judgment and opinion of the Supreme Court of Massachusetts and in the laws of that state and Texas."

Other state statutes are cited and discussed in the book.

Page 79:

"The plain truth is that the very theory of the old competition free and unfettered individualism, has received its severest blows at the hands of its professed friends. In curtailing the liberty of the "trust," the liberty of the lesser corporation, of the partnership and of the individual disappears; what is unconscionable for one is unconscionable for another."

* * * * * *

"That being true, why should not competitors be permitted to get together voluntarily and adopt rules for the regulation of competition *along the lines laid down in the cases and statutes referred to.*" (Italics ours.)

Page 82:

"From the foregoing it follows that *true competition exists* only where

"(A) There are two or more competitors,

"(B) Competing under conditions that enable each to know and fairly judge what the others are doing.

"The essence of competition lies in the element of *knowledge,* it is real, true, and beneficial in proportion to its *openness* and *frankness, its freedom from secrecy and underhand methods.*"

Page 83:

Regarding fraudulent representations of purchasers.

"Is there any real, any true competition in that transaction? None at all—only *false* or *pseudo* competition."

* * * * * *

"The public is saturated with the notion that potential competition is true competition, that competition, like bogey men, should be present in the dark to frighten prices down, that anything like friendly intercourse between competitors is a step toward the suppression of competition and reprehensible. Potential competition is competition, but it is *not true* competition; it is *false* competition of the most demoralizing nature."

Page 87:

"In just the proportion that all this information is available, is the competition real and intelligent. When one man knows what another is doing he is in a position to compete with him; when he does not know, the competition, so-called, is mere *blind rivalry* wherein both may ruin themselves to the detriment, in the long run, of both customers and the public."

Page 96:

"It is not from collusive bidding and price fixing that the public suffers most, but from the secret methods of the old, the false competition."

Pages 98-99:

"The open-price policy—explained in succeeding chapters—of the new competition will help greatly to expose and correct *some of the more glaring evils.*

"When all prices, all bids are made openly so that both customers and competitors may examine and analyze the same, it will be exceedingly difficult to hide agreements intended to favor some to the detriment of others.

"Just now the people are crying for "More Competition," what they want is *more cooperation.* Competition has run mad, it is responsible for nine-tenths of the economic abuses that exist, it is responsible for the trusts themselves; it was the old "cut-throat" competition, with its countless secret practices, that gave the Standard Oil Company's opportunity. It was the threat by the Carnegie Company of still more drastic and relentless competition that led to the formation of the U. S. Steel Corporation.

Page 100:

"The basis of the old competition is secrecy, the strength of the new is knowledge; the essence of the old is deceit, the spirit of the new is truth. Concealement characterizes all the dealings of the old; frankness is vital to the new.

"The old looks with suspicious eye on all associations and combinations; without cooperation the new is impossible."

Page 101:

"So long as its members enter into no agreement to fix prices or control competition, the legality of

such an association (open price association) could hardly be questioned.

"The effect of competition under such open and straightforward conditions would be stability of prices at normal levels. Competing in the open with full knowledge of all the conditions influencing others, no man would make a ruinously low price or an arbitrarily high one. The competition would be real, keen and healthful. Prices would vary but they would not vary widely; men needing work would bid to get it; others with plenty of work would not try; in dull times prices would aproach cost, *but the educational value of the association would tend to deter ruinous bidding;* open criticism of work inefficiently done would expose the tricky bidder.

"As there would be no secrecy about such an association, the public would understand its workings; customers would reap the benefits of true competition and, at the same time, lose the unfair advantages of false."

Page 109:

"It is not easy to convince courts and legislatures that rivals in the same trade or industry can get together without entering into illegal agreements, *but they do,* and that is another of the good results of the new competition."

Page 111:

"The secret price must go, it hashad its day, it does not belong to the twentieth century, it is part of the old order of things that is giving way to the new.

"Men are just beginning to learn that it is easier to make money by straightforward methods than by devious, that truth is a commercial asset."

Counsel state: "And it is not positively claimed that an association engaging in the practices there (in The New Competition) advocated would not be in violation of the law." But see page 120:

"It is believed the open price policy supplies the means; that it is sound, sensible *and legal;* it involves no action, no agreement of any kind or character that is not well within a man's constitutional rights. The right to publish prices, exchange bids freely and openly, to deal frankly with customers and competitors are rights that cannot be curtailed by any legislative body in this country. Congress and legislatures may so provide that the exercise of these rights shall not be abused; that sound and helpful cooperation shall not take on the features of arbitrary and oppresive combination, but *cooperation itself cannot be prohibited.*" (Italics ours.)

Page 122:

"*An open price association has absolutely nothing in common with old line pools and combinations. It is opposed to them and cuts the ground from under them.*

"Nor has it anything in common with the many trades associations already in existence—it is a new departure." (Italics ours.)

Pages 130-131:

"Now comes a fundamental proposition. No bidder is bound to adhere to his bid for the frac-

tion of a second. After ascertaining the bids of others each is free to lower his own bid to secure the work, but, in all fairness, he must immediately file all changes so as to give the other bidders a chance to come in and compete further.

"'That is a rotten scheme,' exclaims the man who has come to the meeting with the sole purpose of 'boosting' prices.

"'Talk about competition! That will throw the doors wide open,' protests another, and so on.

"As a matter of fact, the frank interchange of bids with liberty to cut as members please does not result in fiercer competition; on the contrary, while it does not lessen true competition, *it takes out the ugly elements that go to make up the old 'cut-throt' competition.*

"To restate the matter concretely,—if Smith bids on a piece of work and, after receiving from the secretary copies of the bids of Jones and Robinson, finds he is the high bidder he is at liberty to put in a lower bid to get the work, but he must notify Jones and Robinson what he is doing, and, in all fairness, *notify them in time to permit them to revise their bids if they care to.*

"Speaking from experience the writer can say that for a time after an association is organized the impression may prevail that there is an implied, a moral obligation not to cut bids, and members are reproached bitterly for cutting. This feeling is a survival of the old agreements to maintain prices, springs from conditions where men did agree, directly or indirectly, to stand by their bids—the more indirect the agreement the greater the acrimony when cuts were discussed, and, sooner or later, those old combinations would fall to pieces, disintegrated by distrust.

"Men will cut to get business when they need it, and they will cut all the more if they suspect

others are cutting. No agreement strong enough to prevent this has ever yet been drawn.

"That being true, the safe course is to provide for cutting, remove all restrictions, so that under the rules of the association no member can so much as question the right of another to bid as freely, as often, and as low as he pleases."

Page 133:

"Since members are free to bid as they please it removes the one prolific source of complaint and recrimination incidental to old-time associations namely, that "some one is cutting" and thereby violating an agreement expressed or implied to observe some price.

"It is impossible to keep men to a fixed price, therefore why waste time trying to? It is possible to keep them to an agreement to tell others what they *have done.*"

Page 143:

"Publicity is a cardinal principle of the new competition. All that is done must be done openly."

Page 144:

"The purposes of the organization must be so clearly expressed as to leave no room for inference, no room for argument that possibly something of an illegal or sinister character is hidden.

"The fundamental propositions must be so framed that even a judge not versed in business

will be able to understand the plan and plainly see that, if lived up to, good to the industry must result and that, too, without any additional act of a secret and unlawful character.

"Both the safety and the strength of the associations lie in publicity."

* * * * * *

"Hold meetings with open doors—literally, not figuratively; invite competitors to attend as visitors, whether they wish to join or not, and urge any curious or doubting customer to come and observe what is done."

Page 145:

"First of all 'vicious' bidding disappears. By 'vicious' bidding is meant bids put in by competitors who know they stand no chance of getting the work, simply to 'make the other fellow do it for nothing.' Of all competition that is the meanest. No purchaser has the right to encourage it, no producer has the right to indulge in it; it means the sure elimination of the weak, ultimate monopoly by the strong.

"With open bidding there is the natural, the automatic tendency for prices to approach normal levels; the wide spreads so frequent under false competition—secret bidding—are minimized. There is less bidding below cost at one extreme and fewer or no arbitrarily high prices at the other. The customer is surer of fairer treatment in the long run, the producer of fairer prices. The open-price policy is both a safety vale and a governor, it works toward stability.

"By eliminating secret prices it eliminates secret rebates, concessions, and graft; by bringing all dealings out into the open it ends four-

fifths of the fraud and misrepresentations that now attend the letting of the simplest contracts; the purchaser will no longer be able to secure a fraudulent advantage by saying he has a lower bid when he has not. In all their dealings both purchaser and producer will be more nearly on a footing of equality.

"The business will be placed on a more scientific and rational footing. Instead of competing under conditions of jealous distrust and suspicion, wasting time and money in doing things they either should not do at all, or should do with a fraction of the expenditure, members will cooperate to accomplish as a unit the *things they rightfully may do.*

"Finally, the open price policy—the new competition, with the friendly association it involves, tends to make business life a little better worth living." (Italics ours.)

Respectfully submitted,

WILLIAM J. MATTHEWS,
HUGH T. MARTIN,
Attorneys Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. ——

AMERICAN COLUMN AND LUMBER COMPANY, AND OTHERS, *Appellants*,

vs.

UNITED STATES OF AMERICA.

On Appeal from the United States District Court for the Western District of Tennessee, Western Division.

APPLICATION FOR STAY OR SUPERSEDEAS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The appellants (defendants below), American Column & Lumber Company and others, hereby apply for an order staying or superseding, during the pendency of this appeal, a part of the final decree of the United States District Court, Western District of Tennessee, Western Division, entered April 21, 1920, in a suit in equity under the Sherman Act.

The power of this Court to grant such a stay is clear. *Omaha & Council Bluffs St. Ry. Co.* vs. *Interstate Commerce Commission*, 222 U. S. 582, and cases there cited.

The bill charged that the defendants, manufacturers of hardwood lumber, whose aggregate annual production is

not quite a third of the total, combined to enhance the prices of hardwood lumber by suppressing competition amongst themselves. It then set forth the means alleged to have been employed for the purpose of carrying out the combination, the principal one consisting in the exchange by the defendants with one another, periodically, through a secretary, of certain statistical reports showing, *first*, the stocks of hardwood lumber each had on hand at the end of the period (called "Stock Reports"); *secondly*, the rate of production of each during the period as compared with normal (called "Production Reports"); and *third*, the sales made by each during the period and the prices at which they were made (called "Sales Reports"). The "Stock Reports" and "Production Reports" were made monthly; the "Sales Reports" weekly.

There was a hearing before the District Judge on an application for a preliminary injunction. The parties stipulated that this might be treated as a final hearing; and a final decree has been entered and an appeal taken to this Court. A copy of the decree is annexed, marked Exhibit A.

That decree first enjoins the defendants from making or carrying out any agreement to suppress competition amongst themselves. Other provisions follow, one of which enjoins the defendants absolutely and forever from interchanging the reports above described. The language of this prohibition is as follows:

> "Not to take any further steps whatsoever in compiling, printing or distributing through the said F. R. Gadd, 'Manager of Statistics,' or otherwise, at Memphis, in this District, or elsewhere, the next issues of the monthly 'Stock Reports,' monthly 'Production Reports' and weekly 'Sales Reports' of the said so-called 'Open Competition Plan,' or any other issues of any such or similar reports."

Pursuant to the 74th Equity Rule, application was made

to the District Judge to stay or supersede this part of the decree pending the appeal. He denied the application, and in effect referred the defendants to this Court, apparently on the theory that whether or not the stay should be granted depended upon whether or not his judgment that the law had been violated was correct. A copy of his opinion denying the application is annexed, marked Exhibit B.

It will be observed that the provision in question in effect prohibits the making of these reports as to stocks on hand, production, and past sales, not only when done *for the purpose of, or as a means of,* carrying out the agreement or combination to suppress competition described in the bill, or any similar agreement or combination, but prohibits the making of such reports under any and all circumstances, absolutely and forever.

The question is presented, therefore, of the legality of this practice *in and of itself,* for, while *any* business practice may become unlawful as part of an unlawful plan and be enjoined *as part of such plan,* it cannot be enjoined *absolutely and forever and regardless of the plan* unless unlawful in itself, since when an act innocent in itself and unlawful only as part of an unlawful plan ceases to be employed as part of such plan it becomes re-invested with its innocent character.

The position of the defendants on this question is that they are within their lawful rights in associating for the purpose of furnishing each other with accurate information of the basic facts of the industry in which they are engaged, including the rate of production, stocks on hand, and the prices at which the product has been sold, and that such association does not cease to be lawful merely because, informed by the knowledge so obtained, but without agreement, understanding or concert of action of any kind, the individual members may ask different prices, or pro-

duce at different rates, higher or lower as the case may be, than they would have done had they not been thus informed.

The grounds upon which the application was made to the District Judge to stay or supersede the part of the decree in question, pending appeal, and upon which the application is now renewed, are as follows:

First. This interchange, amongst those engaged in the same industry, of statistics as to stocks on hand, rate of production, and past prices, generally referred to as the "Open Competition Plan" or the "Open Price Plan," has become an established feature of American industrial organization, on the strength of advice of counsel that the practice is legal.*

Second. Until the present case, the legality of the practice, whenever challenged in the courts, has been sustained.

a. United States vs. *Reading Company*, 183 Fed. 427, 226 U. S. 324. (First Reading Case.) The carriers and producers of at least 75 per cent of the anthracite coal output maintained what was called "The Bureau of Anthracite Coal Statistics," to which each reported monthly its tonnage, its sales at New York

*For example, in an opinion to the Yellow Pine M'f'g'rs' Ass'n, dated April 8, 1909, former Solicitor General Lehmann stated: "You have the undoubted right to collect and distribute the fullest information you can get of what is being done in the lumber field, with all details as to the amount of production from day to day, the stock on hand, prices asked and received, etc., and every man who receives this information has the right to act upon it as he thinks proper. If he thinks more is being produced than can be sold, he can reduce the amount of his cutting or cease cutting altogether if he chooses, until conditions improve.

"Beyond this, however, you cannot go. There can be no agreement or understanding between two or more lumbermen to limit their production and therefore no course of conduct from which such an agreement or understanding could be inferred by a court or a jury."

Harbor and Brooklyn (where about one-third of the anthracite output went), and its prices. From this data the secretary of the Bureau made up a composite report showing the tonnages, sales at New York and Brooklyn and the prices of each member. This composite report was sent or made accessible to each member.

The District Court, composed of three Circuit Judges, held that this arrangement did not evidence any unlawful combination. (183 Fed. 442.) This Court, while not discussing this particular question, which was one of many questions in the case, did not disturb the decision of the District Court regarding it.

b. United States vs. *M. Piowaty & Sons,* 251 Fed. 375. (Dist. Ct. Mass.) This was an indictment in two counts against members of the National Onion Association, composed of dealers who controlled 75 per cent of the trade in northern onions. (P. 376.) The first count charged the defendants with having "raised and fixed prices of said onions," through a "concerted" plan, one of the features of which, as alleged in the indictment, was the "compilation and transmission by and between said Association and its members of communications and reports containing information necessary to said members to enable them to execute in concert with one another each and all of the acts involved in said plan and above enumerated."

In sustaining a demurrer to the first count the District Court said:

"In my opinion unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for per-

sons in the same business and the same trade organization, after exchanging information and views, to act in the same way, but independently of each other in buying, selling or prices would extend the scope of the Act beyond anything heretofore decided, and beyond its proper meaning, and cause the greatest confusion and uncertainty." (P. 377.)

c. *United States* vs. *Aileen Coal Co., et al.,* in the United States District Court, Southern District of New York. This was an indictment, returned March 5, 1917, against members of an association of producers of the greater part of the output of so-called smokeless bituminous coal. It charged a combination to enhance the price of such coal by agreement. One item of evidence offered in support of the charge was that the members exchanged with each other information regarding their sales and prices. Judge Grubb, before whom the case was tried, charged the jury at length on this feature, in part as follows:

"It is the right of every man in a business involving the sale of his product to seek to acquire as full information as to conditions in the market in which he is selling his product as he can, and it is also entirely within the right of persons in the trade to share that information openly among themselves. Nor does the mere fact that they accompanied this interchange of information with statements as to what each expects to try to obtain for his product in itself constitute such action a combination within the meaning of this Act."

d. *State* vs. *Arkansas Lumber Co.,* 360 Mo. 212, 169 S. W. 145-177. In this case the Court held:

"If in the instant case there had been touching this price current matter no antecedent unlawful acts of the Yellow Pine Association, if this association had not for years promulgated as current prices lists which

falsely represented and arbitrarily fixed the prices of yellow pine lumber pursuant to the adopted report of a committee on values, and if Smith, the secretary of the association, pursuing the lawful methods originated by him of obtaining reports from correspondents of actual sales, had fairly compiled and averaged such reports into a list of current prices of yellow pine lumber, we would not say that Smith's acts or the acts of the association in his behalf were unlawful."

Third. In all previous cases in which an established business arrangement or procedure, not theretofore passed upon by this Court, has been adjudged in violation of the Sherman Act by a lower court, and application has been made to the Court entering the decree to stay or supersede the same pending appeal to this Court, the application has been granted. The annexed memorandum, marked Exhibit C, states the results in this regard of an examination of the record in every case under the Sherman Act in which there has been a decree against the defendants and an appeal to this Court. It will be seen that out of a total of nineteen such cases a stay or supersedeas has been granted in fourteen; in the remaining five no application for a stay or supersedeas was made, so far as the records show.

While, therefore, appellants (although denying that they have done any such thing) do not ask to have stayed the provisions of the decree enjoining them from making or carrying out any conspiracy or combination to enhance prices, by agreement to suppress competition amongst themselves or by any other means whatsoever, they submit, on reason and precedent, that the provision of the decree which sweepingly prohibits them from interchanging the above described statistical reports under any and all circumstances, whether for the purpose of carrying out any

agreement or combination to enhance prices or suppress competition or not, should be stayed until this Court has decided the grave and important question thereby raised—especially since in all previous cases in which the question has arisen the right to interchange such statistical information has been sustained.

Notice of this application has been served upon the Attorney General.

A joint motion of both sides to advance this cause for early hearing is also being submitted.

L. C. BOYLE,
Attorney for Appellants.

GREGORY & TODD,
Of Counsel.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

No. 750, IN EQUITY

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

AMERICAN COLUMN & LUMBER COMPANY AND OTHERS, *Defendants*.

FINAL DECREE

This cause having come on to be heard on March 8, 9 and 10, 1920, upon the application of the plaintiff for a preliminary injunction as prayed in the bill of complaint and the plaintiff having exhibited its sworn bill of complaint, affidavits and exhibits in support thereof, and the defendants having filed and read their sworn answer, affidavits and exhibits in opposition, and the court having ordered a preliminary injunction to issue as prayed; and the parties having now come again and stipulated that the proceedings heretofore had on the application for a preliminary injunction may be treated as having the effect in all respects of a final hearing, and that a final decree may be entered thereon; and the court having considered the evidence and the arguments of counsel and being fully advised, it is ordered, adjudged and decreed:

First: That an injunction issue out of and under the seal of this Court perpetually commanding the defendants herein, namely: [Here follow the names.] both individually and in their respective capacities as officers, agents, or members of the so-called "Open Competition Plan" of the American Hardwood Manufacturers' Association or otherwise, and all persons combining, conspiring, agreeing or arranging with them, and all other persons whomsoever:

(a) Not to make any further oral agreements at the next regular monthly meetings of the members of the said so-called "Open Competition Plan" of the American Hardwood Manufacturers' Association, at Cincinnati, Ohio, on the second Tuesday of the month; at New Orleans, La., on the second Thursday of the month; at Memphis, in this District, on the second Friday of the month; and at Little Rock, Ark., on the third Thursday of the month; or at any other time or place, to eliminate such competition as may still persist amongst the said defendants;

(b) Not to take any further steps whatsoever in compiling, printing or distributing through the said F. R. Gadd, "Manager of Statistics," or otherwise, at Memphis, in this District, or elsewhere, the next issues of the monthly "Stock Reports," monthly "Production Reports" and weekly "Sales Reports" of the said so-called "Open Competition Plan," or any other issues of any such or similar reports:

(c) Not to discuss prices which have been charged, or are to be charged by the defendants, or by any other persons, for hardwood lumber, at any of the coming association meetings of the defendants;

(d) Not to exchange, through the said F. R. Gadd,

"Manager of Statistics," or otherwise, written predictions to the effect that high prices for hardwood lumber will continue to be maintained and enhanced;

(e) Not to distribute through the said F. R. Gadd, "Manager of Statistics," or otherwise, any further written or printed statements, explanations, or arguments, inciting the defendants to maintain and enhance their prices for hardwood lumber.

(f) To forthwith take appropriate action, as members and officers of the above-described association and so-called "Open Competition Plan," to abandon, and to effectively announce the abandonment of, all efforts whatsoever, by or through such association, having the purpose or tendency to maintain or enhance the price of hardwood lumber; and

(g) Not to do any further act or thing whatsoever having the purpose or tendency to continue in effect or to further the conspiracy described in the Bill of Complaint to maintain and enhance the prices of hardwood lumber.

Second: That the Bill of Complaint be and the same is hereby dismissed as to defendants' West Virginia Timber Company, Bon Air Coal & Iron Company, Dierks Lumber & Coal Company, J. W. James, J. C. Eakle, and E. L. Kooster, without costs as to them and without prejudice to any of the parties.

Third: That the plaintiffs recover of the defendants its reasonable costs herein to be taxed by the Clerk and that execution issue therefor.

JNO. E. MCCALL,
United States District Judge.

Entered April 21, 1920.

EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
AMERICAN COLUMN & LUMBER CO.,
ET. AL., *Defendant,*

No. 750 in Equity

MEMORANDUM OPINION

Filed May 3, 1920. A. G. Mathews, Clerk

This is an application by petition and prayer, first, for an appeal to the Supreme Court of the United States, and, second, that paragraph 3 of the final decree heretofore entered herein be suspended during the pendency of the appeal in the Supreme Court, in so far as it enjoins the defendants—"not to take any further steps whatsoever in compiling, printing, or distributing through the said F. R. Gadd, 'Manager of Statistics' or otherwise, at Memphis, in this district, or elsewhere, the next issues of the monthly 'Stock Reports,' monthly 'Production Reports' and weekly 'Sales Reports' of the said so-called 'Open Competition Plan,' or any other issues of any such or similar reports"—and in so far as it awards costs and execution therefor.

The defendants are as a matter of right entitled to an appeal and an order will be entered granting the appeal as prayed for on defendants executing a good and sufficient appeal bond conditioned as required by law.

A court of equity may in its sound discretion grant an order superseding all or any part of a permanent injunction granted by it pending an appeal therefrom (227 Fed. 274, and cases there cited), but to do so in this case would be to cut the heart out of the final decree, from which an appeal is here prayed, and thus suspend the injunction restraining defendants from violating a statute of the United States which the Court has decreed was being violated by them. If the court is correct in its judgment it is clear the defendants should not be permitted to continue the violation of the statute pending their appeal. It is argued that the case is one of first impression and since this court may be in error its decree should be suspended until the reviewing court passes upon the questions raised. There would be more merit in this insistence if defendants had no other course open to them until a final hearing by the appellate tribunal.

The injunction has been in force more than six weeks. Counsel for defendants informed the Court at the hearing of this petition that an application can be made to the Supreme Court for supersedeas within two weeks from the granting of the appeal.

In that case I think the defendants are not in such a desperate situation as to warrant the granting of the supersedeas by this court.

An order will be entered granting the prayer for appeal and denying the application for supersedeas.

JNO. E. MCCALL, *Judge.*

EXHIBIT C

PRECEDENTS AS TO STAY OR SUPERSEDEAS OF INJUNCTIONS IN CASES UNDER SHERMAN LAW

1. *Anderson* vs. *U. S.*, 171 U. S. 604, October Term, 1898, No. 181. No stay or supersedeas applied for.

2. *Hopkins* vs. *U. S.*, 171 U. S. 578, October Term, 1898, No 210. Stay or supersedeas applied for and granted. (Record pp. 278-279, 286.)

3. *Addyston Pipe Company* vs. *U. S.*, 175 U. S. 211, October Term, 1899, No. 51. While there was no *express* stay or supersedeas in this case the appeal bond was conditioned to answer "all damages and costs," and also recites that defendants "having obtained an appeal and *filed a copy thereof in the clerk's office*, etc." (Record 330), which would seem to indicate that it was understood that the appeal would operate as a supersedeas. See R. S. U. S., §1000, 1007.

4. *Northern Securities Company* vs. *U. S.*, 193 U. S. 197, October Term, 1903, No. 277. Stay or supersedeas applied for as to part of decree and granted. (Record p. 1721.)

5. *Swift & Co.* vs. *U. S.*, 196 U. S. 375, October Term, 1904, No. 103. No stay or supersedeas applied for.

6. *Standard Oil Company* vs. *U. S.*, 211 U. S. 1, October Term, 1910, No. 398. Stay or supersedeas applied for and granted.

7. *U. S.* vs. *American Tobacco Company*, 221 U. S. 106, October Term, 1910, Nos. 118-119. Stay or supersedeas applied for and granted. (Record Vol. 1, p. 334.)

8. *U. S.* vs. *Reading Company* (1st case), 226 U. S. 324, October Term, 1912, Nos. 198, 206, 217. Stay or supersedeas applied for and granted. (Record Vol. 1, pages 500-509.)

9. *Standard Sanitary Company* vs. *U. S.*, 226 U. S. 20, October Term, 1912, No. 554. No stay or supersedeas applied for.

10. *Eastern States Retail Lumber Dealers' Ass'n* vs. U. S., 234 U. S. 600, October Term, 1913, Nos. 511, 550. No stay or supersedeas applied for.

11. *Hamburg American Line* vs. *U. S.*, 239 U. S. 466, October Term, 1915, Nos. 289, 332. No stay or supersedeas applied for.

12. *International Harvester Company* vs. *U. S.*, October Term, 1916, No. 56. Stay or supersedeas applied for and granted. (Record Vol. 1, pp. 123, 124.)

13. *Motion Picture Patents Company vs. U. S.*, October Term, 1913, No. 461. Stay or supersedeas applied for and granted. (Record Vol. 7, p. 3929.)

14. *Chicago Board of Trade* vs. *U. S.*, 246 U. S. 231, October Term, 1917, No. 98. Stay or supersedeas applied for and granted. (Record 170.)

15. *Corn Products Refining Co.* vs. *U. S.*, October Term, 1918, No. 271. Stay or supersedeas applied for and granted. (Record, Vol. A, pp. 157, 163, 176.)

16. *Eastman Kodak Co. vs. U. S.*, pending, October Term, 1919, No. 7. Stay or supersedeas applied for and granted. (Record Vol. 1, pp. 199, 200.)

17. *Keystone Watch Company* vs. *U. S.*, pending, October Term, 1919, No. ——. Stay or supersedeas applied for and granted by order dated August 3, 1915. (Record not printed.)

18. *Associated Bill Posters* vs. *U. S.*, pending, October Term, 1919, No. 11. Stay or supersedeas applied for and granted. (Record Vol. 8, pp. 3085-3086.)

19. *Reading Company* vs. *U. S.* (2d case), decided April 26, 1920, October Term, 1919, No. 4. Stay or supersedeas applied for and granted. (Record Vol. 1, 234.)

FILED
OCT 10 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. [redacted]71

AMERICAN COLUMN & LUMBER CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION.

BRIEF OF WILLIAM J. MATTHEWS AND HUGH T. MARTIN, AMICI CURIAE.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 369.

AMERICAN COLUMN AND LUMBER COMPANY AND OTHERS, APPELLANTS,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

APPLICATION FOR STAY OF PART OF INJUNCTION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a test case to determine the legality under the Sherman Act of the practice of producers in a given field exchanging with each other reports showing the past sales

of each and the prices received, stocks on hand of each, and the rate of production of each.

The decree of the District Court, a copy of which is annexed hereto as Exhibit A, after enjoining the defendants generally from making or carrying out any agreement to suppress competition amongst themselves, enjoined them as follows:

> "Not to take any further steps whatsoever in compiling, printing or distributing through the said F. R. Gadd, 'Manager of Statistics,' or otherwise, at Memphis, in this District, or elsewhere, the next issues of the monthly 'Stock Reports,' monthly 'Production Reports' and weekly 'Sales Reports' of the said so-called 'Open Competition Plan,' or any other issues of any such or similar reports."

This injunction is now in force.

The defendants have done everything possible to expedite the case. On the joint motion of the Government and themselves, made at their suggestion, the case was advanced and argued in October, 1920. Subsequently the Court restored it to the docket for reargument. Then again at the suggestion of the defendants a motion to advance the case was made, and the reargument was set for April 11, 1921. On that day, however, the Court entered an order postponing the case until the next term.

When the case was first brought to this Court application was made[1] to stay or suspend the part of the decree above set forth pending the appeal. The application was denied.[2] At that time, however, an early decision seemed in prospect

[1] June 1st, 1920.
[2] June 7th, 1920.

In view of the length of time which must now elapse before the case is decided, the defendants respectfully renew their application for a stay, and in that behalf urge the following:

First. The interchange, amongst those engaged in the same industry, of statistics as to stocks on hand, rate of production, and past prices, has become an established feature of American industrial organization, on the advice of counsel that the practice is legal.[1] The present case is thus a test case. When the legality of a practice in general use is sought to be tested the aim of the Government should be to avoid so far as possible imposing any burden or hardship upon the particular individual or group whose case is selected as the test case which is not imposed on the other individuals or groups engaged in the same practice. This is but to say that so far as possible there should be equality of treatment in the enforcement of the law. In the present case, if the injunction should not be suspended, and the right of the defendants to exchange the reports should be sustained in the end, the long break in the con-

[1] For example, in an opinion to the Yellow Pine M'f'g'rs' Ass'n, dated April 8, 1909, former Solicitor General Lehmann stated: "You have the undoubted right to collect and distribute the fullest information you can get of what is being done in the lumber field, with all details as to the amount of production from day to day, the stock on hand, prices asked and received, etc., and every man who receives this information has the right to act upon it as he thinks proper. If he thinks more is being produced than can be sold, he can reduce the amount of his cutting or cease cutting altogether if he chooses, until conditions improve.

"Beyond this, however, you cannot go. There can be no agreement or understanding between two or more lumbermen to limit their production and therefore no course of conduct from which such an agreement or understanding could be inferred by a court or a jury."

tinuity of the statistics would substantially impair their value; and, moreover, as appears from the annexed affidavit of its president, the organization of the defendants for the compilation and distribution of the statistics may have gone to pieces in the meantime. Nor would any substantial public interest be served by imposing these disadvantages upon the particular group whose case was selected for the test case. There are hundreds of other similar groups, and to enjoin this one alone while the test of legality is being made would have no appreciable effect on the public welfare. The Bureau of Forestry, in an official report to the Senate, as set forth in the annexed affidavit, has expressly stated that market reporting associations fill a real need in the lumber industry.

Second. Until the present case, the legality of the practice, whenever challenged in the courts, has been sustained.

a. United States vs. *Reading Company*, 183 Fed. 427, 226 U. S. 324. (First Reading Case.) The carriers and producers of at least 75 per cent of the anthracite coal output maintained what was called "The Bureau of Anthracite Coal Statistics," to which each reported monthly its tonnage, its sales at New York Harbor and Brooklyn (where about one-third of the anthracite output went), and its prices. From this data the Secretary of the Bureau made up a composite report showing the tonnages, sales at New York and Brooklyn and the prices of each member. This composite report was sent or made accessible to each member.

The District Court, composed of three Circuit Judges, held that this arrangement did not evidence any unlawful combination. (183 Fed. 442.) This Court, while not discus-

ing this particular question, which was one of many questions in the case, did not disturb the decision of the District Court regarding it.

b. United States vs. *M. Piowaty & Sons,* 251 Fed. 375. (Dist. Ct. Mass.) This was an indictment in two counts against members of the National Onion Association, composed of dealers who controlled 75 per cent of the trade in northern onions. (P. 376.) The first count charged the defendants with having "raised and fixed prices of said onions," through a "concerted" plan, one of the features of which, as alleged in the indictment, was the "compilation and transmission by and between said Association and its members of communications and reports containing information necessary to said members to enable them to execute in concert with one another each and all of the acts involved in said plan and above enumerated."

In sustaining a demurrer to the first count the District Court said:

> "In my opinion unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and the same trade organization, after exchanging information and views, to act in the same way, but independently of each other in buying, selling or prices would extend the scope of the Act beyond anything heretofore decided, and beyond its proper meaning, and cause the greatest confusion and uncertainty." (P. 377.)

c. United States vs. *Aileen Coal Co., et al.,* in the United States District Court, Southern District of New York. This

was an indictment, returned March 5, 1917, against members of an association of producers of the greater part of the output of so-called smokeless bituminous coal. It charged a combination to enhance the price of such coal by agreement. One item of evidence offered in support of the charge was that the members exchanged with each other information regarding their sales and prices. Judge Grubb, before whom the case was tried, charged the jury at length on this feature, in part as follows:

> "It is the right of every man in a business involving the sale of his product to seek to acquire as full information as to conditions in the market in which he is selling his product as he can, and it is also entirely within the right of persons in the trade to share that information openly among themselves."

d. State vs. Arkansas Lumber Co., 360 Mo. 212, 169 S. W. 145-177. In this case the Court held:

> "If in the instant case there had been touching this price current matter no antecedent unlawful acts of the Yellow Pine Association, if this association had not for years promulgated as current prices lists which falsely represented and arbitrarily fixed the prices of yellow pine lumber pursuant to the adopted report of a committee on values, and if Smith, the secretary of the association, pursuing the lawful methods originated by him of obtaining reports from correspondents of actual sales, had fairly compiled and averaged such reports into a list of current prices of yellow pine lumber, we would not say that Smith's

acts or the acts of the association in his behalf were unlawful."

Third. In all previous cases in which an established business arrangement or procedure, not theretofore passed upon by this Court, has been adjudged in violation of the Sherman Act by a lower court, and application has been made to stay or suspend the decree pending the decision of this Court, the application has been granted. The annexed memorandum, marked Exhibit B, states the results in this regard of an examination of the record in every case under the Sherman Act in which there has been a decree against the defendants and an appeal to this Court. It will be seen that out of a total of twenty such cases, including one at the present term of this Court—No. 476, *United Shoe Machinery Co.* v. *United States*—a stay has been granted in fifteen; in the remaining five no application for a stay was made, so far as the records show.

While, therefore, appellants (although denying that they have done any such thing) do not ask to have stayed the provisions of the decree enjoining them from making or carrying out any combination to enhance prices, by agreement to suppress competition amongst themselves or by any other means whatsoever, they submit, on reason, justice and precedent, that the provision of the decree which sweepingly prohibits them from interchanging the above described statistical reports under any and all circumstances, whether for the purpose of carrying out any agreement or combination to enhance prices or suppress competition or not, should be stayed until this Court has decided the grave and important question thereby raised—especially since in all previous cases

in which the question has arisen the right to interchange such statistical information has been sustained.

Notice of this application has been served upon the Attorney General.

L. C. BOYLE,
G. CARROLL TODD,
Attorneys for Appellants.

GREGORY & TODD,
Of Counsel.

EXHIBIT A.

IN THE DISTRICT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION

No. 750, In Equity

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

AMERICAN COLUMN & LUMBER COMPANY AND OTHERS, *Defendants*.

Final Decree.

This cause having come on to be heard on March 8, 9 and 10, 1920, upon the application of the plaintiff for a preliminary injunction as prayed in the bill of complaint and the plaintiff having exhibited its sworn bill of complaint, affidavits and exhibits in support thereof, and the defendants having filed and read their sworn answer, affidavits and exhibits in opposition, and the court having ordered a preliminary injunction to issue as prayed; and the parties having now come again and stipulated that the proceedings

heretofore had on the application for a preliminary injunction may be treated as having the effect in all respects of a final hearing, and that a final decree may be entered thereon; and the court having considered the evidence and the arguments of counsel and being fully advised, it is ordered, adjudged and decreed:

First: That an injunction issue out of and under the seal of this Court perpetually commanding the defendants herein, namely: [Here follow the names.] both individually and in their respective capacities as officers, agents, or members of the so-called "Open Competition Plan" of the American Hardwood Manufacturers' Association or otherwise, and all persons combining, conspiring, agreeing or arranging with them, and all other persons whomsoever:

(a) Not to make any further oral agreements at the next regular monthly meetings of the members of the said so-called "Open Competition Plan" of the American Hardwood Manufacturers' Association, at Cincinnati, Ohio, on the second Tuesday of the month; at New Orleans, La., on the second Thursday of the month; at Memphis, in this District, on the second Friday of the month; and at Little Rock, Ark., on the third Thursday of the month; or at any other time or place, to eliminate such competition as may still persist amongst the said defendants;

(b) Not to take any further steps whatsoever in compiling, printing or distributing through the said F. R. Gadd, "Manager of Statistics," or otherwise, at Memphis, in this District, or elsewhere, the next issues of the monthly "Stock Reports," monthly "Production Reports" and weekly "Sales

Reports" of the said so-called "Open Competition Plan," or any other issues of any such or similar reports:

(c) Not to discuss prices which have been charged, or are to be charged by the defendants, or by any other persons, for hardwood lumber, at any of the coming association meetings of the defendants;

(d) Not to exchange, through the said F. R. Gadd, "Manager of Statistics," or otherwise, written predictions to the effect that high prices for hardwood lumber will continue to be maintained and enhanced;

(e) Not to distribute through the said F. R. Gadd, "Manager of Statistics," or otherwise, any further written or printed statements, explanations, or arguments, inciting the defendants to maintain and enhance their prices for hardwood lumber.

(f) To forthwith take appropriate action, as members and officers of the above-described association and so-called "Open Competition Plan," to abandon, and to effectively announce the abandonment of, all efforts whatsoever, by or through such association, having the purpose or tendency to maintain or enhance the price of hardwood lumber; and

(g) Not to do any further act or thing whatsoever having the purpose or tendency to continue in effect or to further the conspiracy described in the Bill of Complaint to maintain and enhance the prices of hardwood lumber.

Second: That the Bill of Complaint be and the same is hereby dismissed as to defendants' West Virginia Timber Company, Bon Air Coal & Iron Company, Dierks Lumber &

Coal Company, J. W. James, J. C. Eakle, and E. L. Kooster, without costs as to them and without prejudice to any of the parties.

Third: That the plaintiffs recover of the defendants its reasonable costs herein to be taxed by the Clerk and that execution issue therefor.

JNO. E. McCALL,
United States District Judge.

Entered April 21, 1920.

EXHIBIT B.

Precedents as to Stay or Supersedeas of Injunctions in Cases under Sherman Law.

1. *Anderson* vs. *U. S.*, 171 U. S. 604, October Term, 1898, No. 181. No stay or supersedeas applied for.

2. *Hopkins* vs. *U. S.*, 171 U. S. 578, October Term, 1898, No. 210. Stay or supersedeas applied for and granted. (Record pp. 278-279, 286.)

3. *Addyston Pipe Company* vs. *U. S.*, 175 U. S. 211, October Term, 1899, No. 51. While there was no *express* stay or supersedeas in this case the appeal bond was conditioned to answer "all damages and costs," and also recites that defendants "having obtained an appeal and *filed a copy thereof in the clerk's office*, etc." (Record 330), which would seem to indicate that it was understood that the appeal would operate as a supersedeas. See R. S. U. S., §1000, 1007.

4. *Northern Securities Company* vs. *U. S.*, 193 U. S. 197, October Term, 1903, No. 277. Stay or supersedeas applied for as to part of decree and granted. (Record p. 1721.)

5. *Swift & Co.* vs. *U. S.*, 196 U. S. 375, October Term, 1904, No. 103. No stay or supersedeas applied for.

6. *Standard Oil Company* vs. *U. S.*, 211 U. S. 1, October Term, 1910, No. 398. Stay or supersedeas applied for and granted.

7. *U. S.* vs. *American Tobacco Company*, 221 U. S. 106, October Term, 1910, Nos. 118-119. Stay or supersedeas applied for and granted. (Record Vol. 1, p. 334.)

8. *U. S.* vs. *Reading Company* (1st case), 226 U. S. 324, October Term, 1912, Nos. 198, 206, 217. Stay or supersedeas applied for and granted. (Record Vol. 1, pages 500-509.)

9. *Standard Sanitary Company* vs. *U. S.*, 226 U. S. 20, October Term, 1912, No. 554. No stay or supersedeas applied for.

10. *Eastern States Retail Lumber Dealers' Ass'n* vs. *U. S.*, 234 U. S. 600, October Term, 1913, Nos. 511, 550. No stay or supersedeas applied for.

11. *Hamburg American Line* vs. *U. S.*, 239 U. S. 466, October Term, 1915, Nos. 289, 332. No stay or supersedeas applied for.

12. *International Harvester Company* vs. *U. S.*, October Term, 1916, No. 56. Stay or supersedeas applied for and granted. (Record Vol. 1, pp. 123, 124.)

13. *Motion Picture Patents Company* vs. *U. S.*, October Term, 1913, No. 461. Stay or supersedeas applied for and granted. (Record Vol. 7, p. 3929.)

14. *Chicago Board of Trade* vs. *U. S.*, 246 U. S. 231, October Term, 1917, No. 98. Stay or supersedeas applied for and granted. (Record 170.)

15. *Corn Products Refining Co.* vs. *U. S.*, October Term, 1918, No. 271. Stay or supersedeas applied for and granted. (Record, Vol. A, pp. 157, 163, 176.)

16. *Eastman Kodak Co.* vs. *U. S.*, pending, October Term, 1919, No. 7. Stay or supersedeas applied for and granted. (Record Vol. 1, pp. 199, 200.)

17. *Keystone Watch Company* vs. *U. S.*, pending, October Term, 1919, No. 31. Stay or supersedeas applied for and granted by order dated August 3, 1915. (Record not printed.)

18. *Associated Bill Posters* vs. *U. S.*, pending, October Term, 1919, No. 11. Stay or supersedeas applied for and granted. (Record Vol. 8, pp. 3085-3086.)

19. *Reading Company* vs. *U. S.* (2d case), decided April 26, 1920, October Term, 1919, No. 4. Stay or supersedeas applied for and granted. (Record Vol. 1, 234.)

20. *United Shoe Machinery Co.* vs. *U. S.*, October Term, 1920, No. 476. Stay of injunction granted by this Court, October 11, 1920.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 369.

AMERICAN COLUMN & LUMBER COMPANY ET AL.

vs.

UNITED STATES OF AMERICA.

Affidavit of R. M. Carrier.

I, R. M. Carrier, of Sardis, Commonwealth of Mississippi, on oath, depose and say:

That I am the President of the American Hardwood Manufacturers' Association, a voluntary trade organization composed of 329 manufacturers of hardwood lumber.

The defendants, including affiant, in the above entitled cause are members of said Association and the matters drawn in question in this litigation are certain activities of said Association. Among other of the activities challenged by the bill, and specifically enjoined by the order of the lower Court, are the stock and sales reports.

The members of the Association once a month send to the secretary of the Association a copy of their monthly stock inventories. These data are compiled showing totals of all grades, thicknesses and kinds, and as thus compiled are redistributed monthly to the members of the Association. It will be noted that the report shows only totals and does not show the quantities in the hands of individual manufacturers. The value of this report to members is due to the following situation:

There are some twenty-odd different hardwood species growing intermingled in the hardwood forests. These different species are manufactured into a great variety of grades and thicknesses—there being in excess of 150 grades and thicknesses. Hardwoods must be kept in the mill yard six months before being ready for shipment—this due to the drying process. It therefore becomes of vital moment to the producer that he may know from month to month what stocks are in greatest demand to the end that he may adjust his production accordingly.

Hardwoods are bought by specialty factories, such as furniture, automobile, inside trim, flooring, vehicle and other fabricating concerns. It develops at times that the automobile factories are in the market and the furniture factories are not and so on as to all character of consumption. Each consuming industry buys particular grades and thicknesses. It can thus be seen how important it is that the producer in this particular industry be kept informed as to the movement of stocks. There is no source of information to which a producer of hardwoods can go for this character of information except the reports which have been enjoined.

It should be understood that the data thus assembled are of value solely because they are representative of stock conditions within the body of the industry—there being a sufficient number of members to reflect a general status.

The consumers of hardwoods are advantaged as a result of the producer having this information, and this because the producer as a result of the information will accentuate production upon those items for which there is the heaviest demand.

In addition to what has been said, the information is of peculiar value to consumers, and this because the data thus gathered are available to the buyers as well as the producers. In other words, any hardwood buyer can apply to the Association for information as to the location of certain items of stock wanted and the Secretary of the Association will inform the buyer as to the mills having such items. There is no other similar source of information to which the consumers of the country can go for like information.

The second report, to wit, the sales report, is made up as result of the members sending to the Secretary a record of all sales made—this regardless of the price received—high, low or otherwise. These data are assembled by the Secretary and redistributed to the members once a week. The report reaches the desk of the members from ten days to two weeks after the sales recorded have been made. The sole value of the report is to keep the members advised as to the tendency of the market. There are 432 mills operated by the 329 members. These mills produce 28 per cent of hardwood production. The industry is scattered over twenty odd States. All production is competitive in the same market. It will thus be seen that the information given by the sales report is but informative of the market condition and not otherwise.

The gathering of statistics by this group was begun in March, 1917. To assemble and distribute the data represented by the Sales and Stock Reports above described requires much labor. The association has gone to great expense in building up a statistical department capable of handling this work. The injunction of the trial court has been in force about a year. By thus breaking the continuity

of this statistical data the injuntion has already impaired its value. In addition a considerable number of members have withdrawn. The further delay in prospect resulting from the postponement of the reargument of the case until next October is causing still further withdrawals and there is no telling how far the withdrawals will go. In short the organization is threatened with dissolution before the legal question involved can be decided. If it should be eventually held that the defendants have the right to exchange the reports here in question, the continuance of the injunction in the meantime, by interrupting the continuity of the statistics and by dissipating the organization built up at great expense and trouble for the collection of the statistics, would have caused the defendants irreparable loss.

Deponent further says that there are great numbers of industrial groups that gather and distribute similar information as here described and that it is unfair to impose the penalty of dissolution upon this group alone during this period of legal test.

The Government comes in contact with the economic and industrial phases of this industry through the medium of the Bureau of Forestry. This branch of the Government Service in its report to the Senate, June 1, 1920 (copies of which were filed with the brief of the appellants in this case), wherein it discusses, among other things, the value of association work within the body of the lumber industry, says in part:

> "Another activity, developed particularly during the last six or eight years, is the assembling and distribution among members of the association or of a subsidiary organization of current reports on the

prices received in lumber sales. The purpose of this work is to give the members of the association a common and up-to-date understanding of the market which they are supplying. Ignorance of current market values, particularly on the part of small operators, has been one of the reasons for the very unstable conditions often prevailing in the lumber industry. It was evidenced and is still to some extent evidenced by the wide range in prices at which the same grade of lumber is sold in the same locality.

"With lumber manufacture and marketing so widely distributed, the industry has lacked a central medium for reporting price changes from day to day, like the wheat or cotton exchanges. No general and authoritative price data have been available to it, like those assembled and published by the Department of Agriculture on many agricultural products. The function of the regional lumbermen's association in assembling and distributing the prices reported on current sales have grown out of a real need on the part of many operators for better information about their market. It is a development common, in one form or another, to most of the large businesses of the country." (P. 65.)

The order of the lower Court enjoins a number of activities in addition to the sales and stock reports, such as the distribution of market letters; the writing of letters by members in reference to the plan; the assembling and distribution of the monthly questionnaire, and the holding of group meetings. As to these activities the Association does not ask suspension of the injunction. The conditions, however, that would arise from failure to suspend the injunction pending the final decision as to the two reports referred to, would

work peculiar hardship on these defendants due to the disorganizing and disintregating influence of the delay, and this especially in view of the fact that in the final determination of this issue the defendants confidently expect to be accorded the right to inform themselves as to the vital statistics of their industry.

R. M. CARRIER.

STATE OF MISSISSIPPI,
County of ——, *ss:*

Personally appeared before me, R. M. Carrier, who subscribed the foregoing affidavit, and made oath that the facts therein stated are true.

—— ——,
Notary Public.